No. 4095

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE BLUM-O'NEILL COMPANY, a Corporation,
Plaintiff in Error,

vs.

F. J. SULLIVAN,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

DONOHOE & DIMOND, Valdez, Alaska, and LYONS & ORTON, Seattle, Washington,
Attorneys for Defendant and Plaintiff in Error.

FRANK H. FOSTER, Cordova, Alaska, and L. V. RAY, Seward, Alaska,
Attorneys for Plaintiff and Defendant in Error. [1*]

In the District Court for the Territory of Alaska, Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM–O'NEILL COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

Comes now the Blum-O'Neill Company, a corporation, the defendant above named, and being about to prosecute out of the United States Circuit Court of Appeals for the Ninth Circuit a writ of error to review the judgment made, rendered and entered by the above-named District Court in the above-entitled cause on June 21, 1923, does pray

*Page-number appearing at foot of page of original certified Transcript of Record.

an order of said District Court, or of the Honorable E. E. Ritchie, Judge thereof, who presided at the trial of said cause and who made and rendered the aforesaid judgment, that this bill of exceptions containing the following named papers, pleadings, proceedings and exceptions in said cause be filed, settled and certified to as said defendant's bill of exceptions upon such writ of error, to wit:

1. Complaint.
2. Second amended answer.
3. Minute order made February 21, 1923, permitting defendant to file second amended answer.
4. Reply.
5. Transcript of testimony and of the proceedings had upon the trial of the action.
6. Plaintiff's original exhibits "A" and "B."
7. Copy of Defendant's Exhibit No. 1.
8. Verdict.
9. Defendant's motion for a new trial.
10. Minute order denying motion for a new trial.
11. Opinion of court on motion for new trial.
12. Judgment.
13. Order granting defendant sixty days from date of judgment to prepare, file and settle bill of exceptions on writ of error, and fixing supersedeas and cost bond in amount $3,000. [2]

Full, true and correct copies of all which said papers, pleadings, exceptions and proceedings, and the originals of said Plaintiff's Exhibits "A" and

"B," are hereto attached and by reference incorporated in and made a part of this bill of exceptions.

And said defendant prays that the said judgment of said District Court made, rendered and entered herein on the 21st day of June, 1923, in favor of plaintiff and against defendant may be reversed and set aside.

Dated at Valdez, Alaska, July 3, 1923.

DONOHOE & DIMOND,
Attorneys for the Defendant. [3]

In the District Court of the Territory of Alaska,
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

Defendant.

Complaint.

The plaintiff complains of defendant and alleges:

I.

That defendant is now and at all times mentioned herein has been a corporation, duly incorporated under and pursuant to the laws of the Territory of Alaska, and engaged in the general merchandise business at Cordova in the Territory of Alaska:

II.

That on the 4th day of May, 1922, and for some

time previous to said date, Fred Fredrickson was in charge of the warehouse of defendant corporation and was authorized by defendant to superintend the shipment of all goods from said warehouse and to exercise authority for and on behalf of defendant corporation over the employees of said defendant corporation working in said warehouse and over those delivering goods from said warehouse.

III.

The plaintiff, on the said 4th day of May, 1922, was employed by defendant as deliveryman whose business it was to obtain and deliver goods from the warehouse of defendant above mentioned, under the orders and direction of the above-named Fred Frederickson.

IV.

That on the said 4th day of May, 1922, by direction of the above-named Fred Frederickson, plaintiff abandoned the sled which he had been using for the delivery of groceries from said warehouse, [4] hitched the defendant's horse which plaintiff was driving in the course of his employment, to a delivery wagon. That there was still snow and ice on the streets and that the street which lies in front of the building then being used as defendant's warehouse, namely, B Avenue, was covered with ice and snow from a distance of twenty feet from the door of defendant's said warehouse down a steep grade to the intersection of First Street, a distance of about one hundred feet.

V.

That on said 4th day of May, 1922, at the order of

said Fred Frederickson, plaintiff backed said delivery wagon up to the door of said warehouse for the purpose of taking a load of groceries to the main store of plaintiff. That when said wagon was full and no more could be safely placed thereon, plaintiff started to drive away. That when plaintiff had proceeded about twenty feet from the said warehouse door, said Frederickson called for him to stop and against the remonstrances of plaintiff, piled seven cases of milk and eggs on and in front of the seat of said wagon. That by reason of the placing of said additional cases of produce on said wagon, plaintiff had no safe place to sit nor had he any safe place from which to control the said horse of defendant. That plaintiff so informed the said Frederickson, agent of defendant as above stated, but said Frederickson said that the goods would have to go. Before plaintiff could get down from the wagon or remove himself to a safe place, said horse started down said hill and the boxes piled in the front of said wagon by said Frederickson slid forward and over the dashboard striking the horse and causing him to become frightened and to run at great speed down said hill turning into First Street and throwing plaintiff from said wagon in front of the wheels of said wagon which passed over plaintiff's leg and caused same to be broken and mangled.

VI.

That the injury of plaintiff was caused by the carelessness and negligence of defendant and its agent as above set forth. [5]

VII.

That as a result of the carelessness and negligence of defendant, plaintiff suffered a compound fracture of his leg and was confined to his bed from the 4th day of May, 1922, to the 22d day of June, 1922, and since said date has been compelled to use crutches. That thereby plaintiff has been compelled to pay doctor and hospital bills to the amount of $418.00, has suffered the loss of wages to the amount of $490.00 up to the date of this complaint, is informed and believes that it will be impossible for him to do any work for at least three months longer to his damage in the sum of $150 per month or $450.00, that he will be crippled for at least a year from the date of his said injury and has suffered pain and anguish to his damage in the sum of five thousand dollars.

WHEREFORE plaintiff prays judgment against defendant in the sum of Six Thousand Three Hundred and Fifty-eight dollars and for his costs and disbursements herein.

FRANK H. FOSTER,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

F. J. Sullivan, being first duly sworn, on oath deposes and says that he is the plaintiff named in the foregoing action; that he has read the above complaint, knows the contents thereof and that the same is true.

F. J. SULLIVAN.

Subscribed and sworn to before me this 8th day of September, 1922.

[Notarial Seal] FRANK H. FOSTER,
Notary Public.

My Com. ex. April 6, 1923.

Filed in the District Court, Territory of Alaska, Third Division. Sep. 15, 1922. W. N. Cuddy, Clerk. By ————, Deputy. [6]

In the District Court for the Territory of Alaska, Third Division.

No. C—246.

F. J. SULLIVAN,
Plaintiff,

vs.

THE BLUM–O'NEILL COMPANY, a Corporation,
Defendant.

Second Amended Answer.

Comes now the above-named defendant and for answer to plaintiff's complaint on file herein admits, denies and alleges as follows, to wit:

I.

Referring to the 1st paragraph of said complaint defendant admits each and all of the allegations therein contained.

II.

Referring to the 2d paragraph of said complaint

defendant denies each and every allegation therein contained.

III.

Referring to the 3d paragraph of said complaint, defendant admits that on the 4th day of May, 1922, the plaintiff was employed by defendant as a deliveryman whose business it was to obtain and deliver goods from the warehouse and store of said defendant; and defendant denies each and every other allegation in said paragraph contained.

IV.

Referring to the 4th paragraph of said complaint, defendant admits that on the 4th day of May, 1922, plaintiff used a wagon for the delivery of merchandise from defendant's warehouse situated on B Avenue between First and Second Streets in the town of Cordova, Alaska. Defendant further admits that B Avenue was covered with snow and ice for a part of the distance between the door of said [7] warehouse and the place of the intersection of B Avenue and First Street; and defendant denies each and every other allegation in said paragraph contained.

V.

Referring to the 5th paragraph of said complaint, defendant denies each and every allegation therein contained except as hereinafter stated.

VI.

Referring to the 7th paragraph of said complaint, defendant denies each and every allegation in said paragraph contained.

VII.

Referring to the 7th paragraph of said complaint, defendant admits that plaintiff suffered a fracture of his leg and was confined to his bed between the approximate dates herein mentioned; and as to the other allegations of plaintiff's complaint, defendant has no knowledge or information on which to form a belief, and therefore denies the same and all thereof.

FIRST AFFIRMATIVE DEFENSE.

And for a further answer and by way of affirmative defense to the matters and things alleged in plaintiff's complaint defendant alleges:

I.

That during all the times herein mentioned defendant was, and now is, a corporation duly organized and existing under the laws of the Territory of Alaska. That defendant has paid all licenses and taxes last due to the Territory of Alaska, including the license tax last to become due to said Territory. [8]

II.

That for many years last past the defendant has been, and now is, engaged in the sale of merchandise at retail in the town of Cordova, Alaska. The defendant's store at which said business is carried on is situated at the corner of First and C Streets in said town of Cordova. That the defendant also has under lease a warehouse which is situated in the basement of the building located on Second Street and B Avenue in said town. That said warehouse opens on B Avenue near the alley which runs through the block and intersects C Street between

First and Second Streets. That the street in front of said warehouse is quite steep having a gradient of approximately ten per cent from the horizontal.

III.

That on the 4th day of May, 1922, the plaintiff was, and for a long time prior thereto he had been, in the employ of defendant as a deliveryman and it was the duty of plaintiff under his employment, to haul merchandise from the store and warehouse of defendant, as above described, to other places in and around the town of Cordova, Alaska, such merchandise was usually hauled in automobiles, or on sleds or wagons furnished by defendant. That on the 4th day of May, 1922, and at all other times while plaintiff was so employed by defendant, the defendant did not control, or attempt to control, the plaintiff in the mode or manner in which he did his work, it being the plaintiff's duty and business under his said employment to transport said merchandise over such route by such method and in such manner as to him should seem safest and best.

IV.

That on the said 4th day of May, 1922, the plaintiff was directed by the defendant to transport some merchandise from defendant's said warehouse to some other place or places in the town of Cordova. That plaintiff accordingly went to said warehouse with defendant's horse and wagon and with the assistance of the said [9] Fred Fredrickson, another employee of defendant, who was a fellow-servant of plaintiff, loaded the merchandise on said wagon. That at this time a portion of B Avenue

between the door of said warehouse and First Street in the town of Cordova was covered with ice and snow while the portion of B Avenue between the door of said warehouse and Second Street was clear and dry and could be safely traveled and plaintiff could readily and easily and safely have driven the horse, which was pulling the wagon containing said merchandise, from the door of said warehouse up B Avenue to Second Street, without any appreciable loss of time and without any extra labor. That on this date the said Fred Fredrickson had suggested to plaintiff that the merchandise taken from said warehouse be hauled that way, that is from the door of said warehouse up B Avenue to Second Street and thence to the place of delivery, but the plaintiff when his wagon was loaded with said merchandise, disregarding said advice, started to drive down B Avenue toward First Street, and the wheels on one side of the wagon cut through the soft snow thus tipping up the wagon so that a part of the merchandise fell out, whereupon plaintiff also sprang, fell or was thrown from said wagon, but plaintiff fell entirely clear of said wagon and after said wagon had passed him ran alongside of said wagon and in an attempt to get on said wagon plaintiff fell and one of the wheels of said wagon passed over plaintiff's leg breaking it, this being the same injury complained of in plaintiff's complaint herein.

V.

That on May 4, 1922, plaintiff was entirely and thoroughly familiar with the conditions of said B Avenue and the other streets in the town of Cor-

dova, Alaska, and knew, or should have known by the exercise of a reasonable degree of observation, of the risks and dangers attendant upon driving a loaded wagon down [10] B Avenue between the door of said warehouse and First Street, and the injuries which plaintiff then sustained were caused solely by his own negligence and lack of care, and not by any negligence, fault or lack of care on the part of the defendant.

SECOND AFFIRMATIVE DEFENSE.

And for a second affirmative defense to the matters and things alleged in plaintiff's complaint, defendant alleges:

I, II, III and IV.

Defendant hereby refers to paragraphs I, II, III and IV of its first affirmative defense to plaintiff's complaint, hereinbefore set forth, and by reference adopts the same as paragraphs I, II, III, and IV of this, its second affirmative defense to said complaint.

V.

That on May 4, 1922, the plaintiff was entirely and thoroughly familiar with the conditions of said B Avenue and the other streets in the town of Cordova, Alaska, and knew, or should have known by the exercise of a reasonable degree of observation, of the risks and dangers attendant upon driving a loaded wagon down B Avenue between the door of said warehouse and First Street, and the injuries which the plaintiff then sustained were caused by his own negligence and lack of care, and by the risks of plaintiff's employment of which he knew, or

should have known by the exercise of a reasonable degree of observation and which he assumed.

THIRD AFFIRMATIVE DEFENSE.

And for a third affirmative defense to the matters and things alleged in plaintiff's complaint, defendant alleges:

I.

That during all the times herein mentioned defendant was, and now is, a corporation duly organized and existing under the laws of the Territory of Alaska. That defendant has paid all license and [11] taxes due to the Territory of Alaska, including the license tax last to become due to said Territory.

II.

That during all of the times mentioned in plaintiff's complaint, and in this answer, the said Fred Fredrickson was an employee of the defendant and a fellow-servant of the plaintiff and that said defendant had not at any time, or in any manner, delegated to the said Fred Fredrickson the right, power or authority to perform any of the duties or obligations owed by defendant to said plaintiff; and if the injuries sustained by plaintiff, as alleged in plaintiff's complaint, were in any manner caused by or due to the negligence of the said Fred Fredrickson, which the defendant does not admit but expressly denies, then such injuries were caused by and due to the negligence of a fellow-servant of plaintiff in his said employment and for which defendant is not liable. That during all of said time the said Fred

Fredrickson was a fellow-servant of plaintiff and not the vice-principal of defendant.

WHEREFORE, defendant prays that plaintiff take nothing by reason of his complaint, and that the same be dismissed, and that defendant recover of plaintiff his costs and disbursements herein incurred.

DONOHOE & DIMOND,
Attorneys for the Defendant. [12]

United States of America,
Territory of Alaska,—ss.

H. I. O'Neill, being first duly sworn, upon his oath says: I am the vice-president of the Blum O'Neill Company, the defendant named in the foregoing answer. That I have read said answer and know the contents thereof, and I believe the same to be true.

H. I. O'NEILL.

Subscribed and sworn to before me this 20th day of February, 1923.

[Notarial Seal] FRANK J. HAYES,
Notary Public for Alaska.

My commission expires May 21, 1925.

Service of the foregoing answer by receipt of copy thereof acknowledged, and verification thereof at this time waived this 19th day of February, 1923.

FRANK H. FOSTER and
L. V. RAY,
Attorneys for the Plaintiff.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 21, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy. [13]

In the District Court for the Territory of Alaska,
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM–O'NEILL COMPANY, a Corporation,
Defendant.

Trial Continued.

Now on this day the trial of this cause was resumed, the plaintiff being present in person and represented by Messrs. Frank H. Foster and L. V. Ray; the defendant being represented by Messrs. Donohoe & Dimond.

WHEREUPON roll-call of the jurors in the box showed all present.

MINUTE ORDER.

On stipulation between counsel for the plaintiff and the defendant, in open court, it is

ORDERED that the defendant may file its second amended answer in this cause.

(Copied from Court Journal No. 13, February 21, 1923, 17th Court Day.) [14]

In the District Court for the Territory of Alaska, Third Division.

No. ——.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

Defendant.

Reply.

Comes now the above-named plaintiff and as a reply to the affirmative matter contained in defendant's answer on file herein admits, denies, and alleges as follows, to wit:

Answering defendant's first affirmative defense:

I.

As to Paragraph One of defendant's affirmative defense, plaintiff has not sufficient information upon which to base a conclusion and, therefore, denies the same.

II.

Answering Paragraph Two of defendant's first affirmative defense, plaintiff admits the same and the whole thereof.

III.

Answering Paragraph Three of defendant's first affirmative defense, plaintiff admits the same and the whole thereof.

IV.

Answering Paragraph Four of defendant's first

affirmative defense, plaintiff admits the first seven lines with the exception of the statement in line 7 that Frederickson was a fellow-servant of plaintiff, and plaintiff alleges that Frederickson was a vice-principal.

Answering that sentence commencing on line 8 and ending on line 16, plaintiff alleges the fact to be that the street above the door of said warehouse was also covered with [15] snow and ice, and that it was impossible for the wagon in the condition in which it was at that time, as to being heavily laden, to have been pulled by the said horse up the hill to Second Street.

Answering the remainder of said fourth paragraph, plaintiff denies that said Frederickson made any suggestion to plaintiff in regard to pulling said merchandise up the hill to Second Street, and denies that the accident was caused by the wheels cutting through soft snow, but alleges that said accident took place through the overloading of said wagon, as set forth in plaintiff's complaint. Any other affirmative matter contained in said fourth paragraph is hereby denied.

V.

As to Paragraph Five, plaintiff admits that on May 4th, 1922, he was familiar with the condition of said B Avenue and the other streets in the town of Cordova, Alaska, and alleges that the course which he took in driving down B Avenue would have been safe if said wagon had not been overloaded and improperly loaded by Frederickson contrary to plaintiff's objection and expostulations, as stated in

plaintiff's complaint. Plaintiff denies that the injuries which he sustained were caused of his own negligence and lack of care and states that such injuries were caused by the fault and lack of care on the part of the defendant.

REPLY TO SECOND AFFIRMATIVE DEFENSE.

Replying to the second affirmative defense set forth in defendant's answer, plaintiff hereby refers to Paragraphs One, Two, Three, and Four of his reply to defendant's first affirmative defense as hereinbefore set forth, and by reference adopts the same as Paragraphs One, Two, Three, and Four of this, his reply to plaintiff's second affirmative defense. [16]

V.

Plaintiff admits that on May 4, 1922, he was entirely and thoroughly familiar with the conditions of said B Avenue and the other streets in the town of Cordova, Alaska, and denies each and every other statement contained in said paragraph.

WHEREFORE plaintiff prays judgment as set forth in his complaint.

FRANK H. FOSTER,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

F. J. Sullivan, being first duly sworn, upon his oath says: I am the plaintiff named in the foregoing cause of action and I have read the above

reply and know the contents thereof and I believe the same to be true.

FLORENCE J. SULLIVAN,

Subscribed and sworn to before me this 12 day of Jan., 1923.

[Notarial Seal] FRANK H. FOSTER,
Notary Public for Alaska.

My commission expries April 6, 1923.

Filed in the District Court, Territory of Alaska, Third Division. Jan. 26, 1923. W. N. Cuddy Clerk. By Thos. S. Scott, Deputy. [17]

In the District Court for the Territory of Alaska, Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM–O'NEILL COMPANY, a Corporation,

Transcript of Evidence.

BE IT REMEMBERED, That the above-entitled cause came on duly and regularly to be heard at Valdez, in the said Division and Territory, on Tuesday, February 20, 1923, before Honorable E. E. RITCHIE, Judge of said Court, and a Jury:

The plaintiff being represented by his attorneys and counsel, Frank H. Foster and L. V. Ray:

The defendant being represented by its attorneys and counsel, Donohoe & Dimond.

The jury having been empanelled and sworn, opening statements were made to the Court and jury by Mr. Foster on behalf of the plaintiff and by Mr. Donohoe on behalf of the defendant:

WHEREUPON the following additional proceedings were had and done, to wit: [18]

In the District Court for the Territory of Alaska, Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

Defendant.

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PLAINTIFF'S CASE.

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DEFENDANT'S CASE.

EXHIBITS.

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Testimony of F. J. Sullivan, in His Own Behalf.

F. J. SULLIVAN, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination by Mr. FOSTER.

Q. What is your name? A. Florence Sullivan.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Where do you reside. A. Anchorage.

Q. Where did you live last May? A. Cordova.

Q. Territory of Alaska, Third Division?

A. Yes, sir.

Q. Where did the events take place that are complained of in your complaint? A. Cordova.

Q. On May 4th last? A. Yes, sir.

Q. Now what is your occupation?

(Testimony of F. J. Sullivan.)

A. I was then deliveryman for the Blum-O'Neill Company.

Q. How long were you deliveryman for the Blum-O'Neill Company? A. At that time?

Q. How long have you worked for the Blum-O'Neill Company altogether?

A. I worked for three and a half years for S. Blum & Company and one year and eight months for the Blum-O'Neill Company.

Q. For the Blum-O'Neill Company when did you first start work?

A. The latter end of September, 1918.

Q. Where did you work?

A. Cordova, Alaska. [20—2]

Q. In what place?

A. I was working in the warehouse under Fred Frederickson.

Q. This Fred Frederickson is the same man whom you claim you were working under at the time the accident took place? A. Yes, sir.

Q. At that time where was Frederickson working?

A. He had charge of the warehouse, retail and wholesale, shipping—

Mr. DONOHOE.—Just a minute: I ask that the witness just answer the question.

The COURT.—Yes, you should only answer the question.

Q. Who was foreman or boss of the warehouse?

Mr. DONOHOE.—We object to the question as

(Testimony of F. J. Sullivan.)
too indefinite as to time. What took place in 1918 has nothing to do with what took place in 1922.

The COURT.—Yes, it should be confined to the time of the accident.

Mr. FOSTER.—Your Honor, I wish to show that in 1918 a certain condition existed which is presumed to have continued.

Mr. DONOHOE.—It is not presumed.

The COURT.—No, Mr. Foster, I don't agree with you. The conditions at the time this happened should be within the personal knowledge of the plaintiff. Objection sustained. Exception allowed.

Q. During the year 1918 when you were working there what occupation did you follow?

Mr. DONOHOE.—We object to the question as too remote from the accident complained of.

Mr. FOSTER.—I want to show the plaintiff's knowledge of the conduct of the business of the defendant, upon which is based the claim that Frederickson was a vice-principal. [21—3]

Mr. DONOHOE.—We can't go back to the year one to go over that. This is four years previous to the occurrence of this accident.

The COURT.—Objection sustained. Exception allowed.

Q. Were you working in the warehouse in your former employment in 1918 and 1919?

Mr. DONOHOE.—Same objection, too remote.

The COURT.—Objection sustained. Exception allowed.

Mr. FOSTER.—As illustrative of the testimony

(Testimony of F. J. Sullivan.)

only and not to be admitted in evidence I would like to offer this plat.

Mr. DONOHOE.—I have no objection to the plat with the exception of the markings of twelve and eight per cent grade.

The COURT.—It will be admitted as an approximate illustration.

Q. During the year after your first employment, 1918–1919, was there a space of time between that and your last employment? A. Yes, sir.

Q. How long?

A. From October, 1919, until 1921, October.

Q. In October, 1921, you went to work on your last employment? A. 1922.

Q. You mean 1921? A. Yes.

Q. When you went to work in October, 1921, who was in charge of the warehouse department?

A. Mr. Frederickson.

Q. Fred Frederickson? A. Yes.

Q. What was your duties?

A. Deliveryman. [22—4]

Q. Was there a notice posted near the telephone in the warehouse at the time you went to work, signed by the Blum-O'Neill Company, by its president, in which Mr. Frederickson was designated as superintendent in charge?

Mr. DONOHOE.—I object to that question as put in this way. It is not a fair question and it is not admissible in my opinion.

The COURT.—The question is leading.

(Testimony of F. J. Sullivan.)

Q. All right, I will just ask him whether there was any notice posted up there.

A. Yes, sir, there was.

Q. Where was it posted?

A. In the middle of the warehouse on a post.

Q. By whom was it signed?

A. I think it was signed M. Brock, by the Blum-O'Neill Company. It was there in 1918 and 1919.

Mr. DONOHOE.—I move at this time to strike out the testimony on the ground that there is no date fixing the time when he saw the notice.

The COURT.—The testimony about it being there in 1918 and 1919 will be stricken. The remainder will stand if he fixes the date. Exception allowed.

Q. While you were working for the Blum-O'Neill Company in the warehouse department on what date was this notice posted. In the first place, as far as you know, was it posted while you were working there?

A. It was on or about the 25th of December, 1918; the first time after Mr. Clark went outside; after the foreman went out.

Q. And when did you see the notice last, to your recollection?

A. I couldn't state that. I saw it so often I couldn't put a date on it. While it was there I saw it every day. [23—5]

Q. Do you remember seeing it since your last employment? A. Yes, sir.

Q. And what did the notice state?

(Testimony of F. J. Sullivan.)

Mr. DONOHOE.—We object to the question as not calling for the best evidence. Why don't you produce the notice?

Mr. FOSTER.—Well, it's in your possession and we make a demand on you for it.

The COURT.—The demand should have been made earlier.

Mr. DONOHOE.—It is clear it is impossible for us to comply with that request now. Why, here we are 100 miles from where the notice was supposed to be.

The COURT.—The objection is sustained. Exception allowed.

Mr. DONOHOE.—I have the further objection to offer to this line of testimony, that it is not within any issue joined by the pleadings. The complaint in itself has never set up that Frederickson was a vice-principal by reason of being a superintendent or manager of a separate department, which is absolutely necessary to plead, and until Mr. Foster made his opening statement I had no idea as to what he was going to rely upon.

The COURT.—I don't agree with you as to that, Mr. Donohoe.

Q. Do you know whether that notice that you have testified about was put up, was there at the time you were hurt? Do you know whether it continued to be posted that long?

A. I can't say that, Mr. Foster.

Q. You don't know? A. No, sir.

Q. At this time the plaintiff offers to show by

(Testimony of F. J. Sullivan.)

this witness what the notice contained. Mr. Sullivan, what—

Mr. DONOHOE.—We object to the witness testifying to the contents of any notice.

The COURT.—I am not making a final ruling at this time. At this time it is not admissible. Exception allowed. [24—6]

Mr. DONOHOE.—We have a further objection to make and that is on the ground that it is too remote. The witness has just testified that he didn't know whether it was up there at the time of the accident or not. Also object to the offer orally to prove the contents of this notice.

Q. When did you see the notice last?

A. I can't tell what day. I have seen it several days while working there.

Q. Can you say there was any time when the notice was not there? A. I cannot.

Q. You don't know?

A. I don't. It might be there yet. I never took notice of it toward the last.

Q. This warehouse department that you call it; what did that consist of?

A. General merchandise.

Q. Will you take the stick and show the jury the location. This street marked Second Street; this street marked B Avenue and here First Street. What is the building on the corner of Second Street and B Avenue?

A. That is the Blum building, the warehouse.

Q. The building on the other corner of the block,

(Testimony of F. J. Sullivan.)

the building on the other corner of C Avenue and First Street; what is that?

A. That is the Blum store building.

Q. What does this mark on the Blum building show; these two marks?

A. That is where we get the groceries out; that is the warehouse.

Q. What was the size of the warehouse building.

A. 100 feet long; 50x100.

Q. How many stories?

A. Three, no two stories—basement and another story.

Q. For what purpose during the month of May, 1922, was the basement used?

A. For a grocery warehouse. [25—7]

Q. Was there a counter in there?

A. Yes, sir; a big counter.

Q. Was there a cash register?

Mr. DONOHOE.—We object to these questions on the ground that they are leading. Let the witness state what was in there.

The COURT.—Yes, that would be better.

Q. What was in there besides the counter and other things you spoke of?

A. There was a general line of merchandise. There was not any hardware—it was mostly groceries. We had a retail counter on one side and the wholesale orders were also put up.

Q. And what was on the floor above that?

A. There was bedding and furniture.

(Testimony of F. J. Sullivan.)

Q. What was the system you followed there in the warehouse when you sold something?

A. We had a little box we put the cash in and the bookkeeper came up every night and took it down to the office.

Q. How much cash was taken in there approximately every day? A. Forty or fifty dollars.

Q. Were other orders than cash orders taken there? A. Yes, sir.

Q. Who was in charge of the warehouse?

A. Mr. Frederickson.

Mr. DONOHOE.—We object to that question as calling for a conclusion and move that the answer be stricken.

The COURT.—He may answer if he knows. It would be better if he would state his duties and who gave the orders there. Yes, I think the answer will be stricken. Exception allowed.

Q. Who gave the orders around that place?

A. Fred Frederickson. [26—8]

Q. What did he do?

A. Well he took charge of the wholesale and retail business in that warehouse and the deliverymen were supposed to do as he told them.

Mr. DONOHOE.—We object to what the deliverymen were supposed to do.

The WITNESS.—That is what they did do.

The COURT.—I don't know that that is objectionable. Overruled. Exception allowed.

Q. When the deliverymen were to deliver goods, from whom did they receive their orders?

(Testimony of F. J. Sullivan.)

A. From Frederickson.

Q. Who gave the orders in regard to the maintenance of the wagons and sleds, repairs, etc.?

A. Well, when there were sleds to be fixed Frederickson told us to take them to the blacksmith-shop to be fixed.

Q. Did you ever see Frederickson around the barn?

A. Yes, he came down to look over the barns frequently.

Q. What was your duty as regards the horses?

A. I looked after them.

Q. At the barns you mean? A. Yes.

Q. Who gave you the feed for them?

A. Mr. Frederickson. We kept the oats in the warehouse and the hay was delivered from the dock into the barn.

Q. When you were delivering goods who, if anyone, gave directions as to the loading?

A. There was just two of us there and Mr. Frederickson gave me orders as to loading.

Q. What kind of directions or orders? [27—9]

A. Well, he directed me as to how to put on my orders to the best advantage. If he would see me loading he would tell me the best way, or say this is a better way, and tell me where to go or bring something from the warehouse some place, but he always told me to come back and where to go to afterwards.

Q. And as to the placing of the orders on the wagons?

(Testimony of F. J. Sullivan.)

A. Sometimes he helped me and most of the time I did it myself.

Q. Were you directed by anyone but Frederickson? A. By Frederickson, always.

Q. Who hired and discharged the men around the warehouse?

A. There weren't any men discharged around the warehouse except men on the short jobs and Frederickson hired and fired them. The men such as myself were hired in the main office.

Q. Do you know of any men in the office being discharged by Mr. Frederickson during your last employment? A. No, sir.

Q. Was there anyone discharged during that time? A. No, sir.

Q. No one discharged? A. No.

Q. But you say that for short jobs Frederickson hired and fired them? A. Yes, sir.

Mr. DONOHOE.—We move to strike that answer because the witness has said that during his last employment no one was employed or discharged.

The COURT.—Well, the question is leading the way it is put. You better ask another question. The answer will be stricken.

Q. In the month of May, 1922, the 4th of May, say the 3d and 4th of May, what were the weather conditions at Cordova as regards snow or sunshine?

A. It was good weather. [28—10]

Q. Was there any snow on the ground?

(Testimony of F. J. Sullivan.)

A. There was lots of snow some places; some places more than others.

Q. What vehicle had you been using in delivering goods? A. A sled.

Q. Now, what vehicle did you use on the morning of the 4th of May? A. A wagon.

Q. For what reason did you switch to the wagon from the sled?

A. Well, I got orders to take the wagon instead of the sled.

Q. Who told you to? A. Mr. Frederickson.

Q. Just take a look at this map, this description. You have stated that the warehouse door is at the lower corner of the frame building, the warehouse building. What was the condition on the 4th of May, 1922, of B Street between 1st and 2d Streets as to snow?

A. Just outside of the warehouse it was not very deep but further down it was deeper, more snow.

Q. Above the warehouse, what was the condition?

A. It was bad, and on this street (indicating) it was deep snow.

Q. You mean on Second Street? A. Yes, sir.

Q. What was the condition of the snow?

A. On Second Street I couldn't go through there at all because my wagon wouldn't go. Big teams, double teams, went through but my wagon with one horse couldn't go.

Q. What wagon did you use. What capacity wagon did you use?

(Testimony of F. J. Sullivan.)

A. About sixteen hundred or seventeen hundred pounds.

Q. And how big a horse?

A. A horse about eleven hundred pounds. [28A—11]

Q. How wide were the tires?

A. Three-inch tires to the best of my knowledge. Three to four; not over four, narow gauge.

Q. You mean as wide as this (indicating)?

A. No, three-inch.

Q. Do you appreciate how wide three inches is, Mr. Sullivan?

A. Well, you know what narrow wheels are.

Q. On the 4th of May when you brought up your delivery wagon, where did you go first?

A. To the warehouse.

Q. What did you do there?

A. I got a load of what they call shorts and took them to the wharf.

Q. Under anybody's direction?

A. Yes, Mr. Frederickson's and he told me to come back and get a load for the Carlisle Packing Company.

Q. Which way did you go when you left the warehouse?

A. I went down B Avenue to First Street.

Q. And from there north to the store building?

A. Yes, sir.

Q. Then you came back to the warehouse to get the rest of the orders. A. Yes, sir.

Q. I ask you this question: did anyone ever di-

(Testimony of F. J. Sullivan.)

rect you as to the method of loading the wagon in taking goods from the warehouse?

A. If I had a big load Frederickson would always tell me how to get the most on—help me to put it on.

Q. When you reached the warehouse on this second trip what was done or said between Frederickson and yourself?

A. I backed up to the door and put on the rest of the orders. He had them ready for me. It filled the wagon completely. [29—12]

Q. Did anyone tell you where you were to take this load?

A. Yes, Mr. Frederickson gave me the tickets and told me to take it to Carlisle Packing Company.

Q. What amount of goods did you put on the wagon?

Q. I had between fifteen and sixteen hundred pounds; not less than that.

Q. These tickets that you speak of,—they were the bills? A. Yes, sir.

Q. To whom did you deliver those?

A. I had them signed as always. I had them signed in the Carlisle Packing Company and brought them back.

Q. Who did you give them to?

A. I gave them to Frederickson. Sometimes I took them to the office and sometimes I gave them to Frederickson.

Q. When you had the load on, the load as you testified; what did you do?

A. I pulled out and—

(Testimony of F. J. Sullivan.)

Mr. FOSTER.—Just a minute, show the jury on the diagram what you did.

A. Well, I went out through the warehouse and I just made a turn into the hill.

Q. Did you turn in the middle of the street?

A. Yes, sir.

Q. Go ahead—

A. Then he told me to stop a minute, that he had some more stuff to go.

Q. He told you to stop? A. Yes, sir.

Q. What did you say, if anything?

A. I said I had all I could put on. He said he realized there was no more room but he would put it on on the footboard, so he put the four cases of milk and three cases of butter on the footboard. [29A—13]

Q. What did he say?

A. He said I would have to get down the hill with it. He said—

Mr. DONOHOE.—We object to this testimony.

The COURT.—Objection overruled. Exception allowed.

Mr. FOSTER.—Go ahead and state what Frederickson said?

A. Frederickson told me he had four cases of milk and three cases of butter to go to the store. I told him there was no room in the wagon for it and he said there wasn't and we would put it on the footboard. The first thing I knew there was four cases of milk and three cases of butter there.

Mr. DONOHOE.—We object to that. The wit-

(Testimony of F. J. Sullivan.)

ness was not asked that. He should just answer the question.

The COURT.—Yes, Mr. Sullivan, you should just answer the questions.

Q. After Frederickson had put these cases of butter on the footboard, where were you at that time?

A. I was in the seat, standing on the footboard.

Q. And what did he do with the milk, if anything?

A. The four cases of milk he put on the seat.

Q. How were they arranged?

A. Two on each side of me.

Q. And you in the middle? A. Yes, sir.

Q. Was there any further conversation between you and Frederickson in regard to these things at that time?

A. Why, there was no further conversation. I objected to taking them and he said I would have to take them. He said I would have to take them or quit, somebody else would.

Q. You can state what happened then. Where did Frederickson go when he put the last case on the seat? A. He went into the warehouse. [30—14]

Q. Did you see Dudley Allen at that time?

A. I know who he is.

Q. Who is he?

A. A salesman for some firm in Seattle.

Q. Did you see him then?

A. He just came up the hill at that time.

(Testimony of F. J. Sullivan.)

Q. In what position was the horse at the time these additional cases were put on the wagon?

A. Facing down the hill.

Q. Did you have the brake on? A. Yes, sir.

Q. What is the weight of a case of milk?

A. I am not sure but I think it is seventy-two pounds.

Q. What is the weight of a case of butter?

A. Sixty pounds of butter in a case.

Q. You say there were seven cases altogether?

A. That is what I think there was—as near as I can remember.

Q. What happened then?

A. While I was looking up there the horse started to go and I grabbed the line with one hand and put the other hand on the two cases of milk there and my feet on the case of butter. The horse started to go and the case of milk slid off and hit the horse and then the wagon dropped into a kind of a hole, a rut in the snow, and me and the case of milk fell on the side in the bank and I slid under the wagon and the first wheel ran over my leg and I was dragged then between the wheels and the other wheel ran over my leg again and broke it.

Q. By reference to the diagram, how far were you when the case of milk fell off?

A. I was just about here (indicating). [31—15]

Q. How far would you say that was below the alley?

A. I would say about thirty feet or more.

(Testimony of F. J. Sullivan.)

Q. When was it that the first wheel ran over you?

A. Just as soon as I slid under the wagon. I hit a piece of ice. The ice and snow was lined up alongside the trail there and as soon as I fell the hub of the wheel turned me over, and the horse ran away, and I was in between, dragging.

Q. How far were you dragged?

A. Down to in front of Laurie's store.

Q. Then what happened to you?

A. I was taken to the hospital then, that was all.

Q. What happened to you at the hospital?

A. Well, they cut the clothes off my leg and body and put me to bed.

Q. Did the doctor attend you?

A. Not right away, he did five days afterwards.

Q. What did he do to you?

A. He bored a hole in my heel and put a sack of rocks, used a spike and rigged up a block and pulley and set it.

Q. In what condition was your leg as to being broken or otherwise?

A. It had been broken in three places. This one bone was broken twice and that bone broke like that (indicating).

Q. How long were you in the hospital?

A. Two months.

Q. What wages had you been receiving from Blum-O'Neill? A. $150 a month.

Q. Have you done any work since the accident, the 4th of May last? A. No, sir. [32—16]

(Testimony of F. J. Sullivan.)

Q. Are you now able to work at manual labor?

A. No, sir.

Q. Do you know any other business but mining or manual labor; I mean to say are you a bookkeeper or an office man? A. No, sir.

Q. Who paid your hospital and doctor bills?

A. I paid it.

Q. Has that leg been painful?

A. Not now, it isn't painful.

Q. Has it been painful? A. Yes, sir.

Q. How long a time?

A. After four months, it didn't pain very much after that.

Q. Well, how about the four months?

A. It was painful up until then, yes.

Q. Describe the kind of pain?

A. Well, I don't know how I can describe it. You might know what any leg would be like, broken and fractured. It is just a general pain, I guess.

Q. Did you have an X-ray picture taken of this leg recently? A. Yes, sir.

Q. By whom? A. By Dr. Beeson.

Q. Where? A. Anchorage.

Q. Who took the picture?

A. Dr. Thompson and Dr. Beeson, both together.

Q. When did this take place?

A. It is about a month ago.

Q. Was it the 12th of January?

A. Yes, I think it was about the twelfth or thirteenth. [33—17]

Q. And what time of day was this picture taken?

(Testimony of F. J. Sullivan.)

A. It was taken about, I am not sure, I think it was about two o'clock.

Q. And after the picture was taken what did Dr. Thompson do?

A. He developed it right in the room. There is a little dark room there. They developed it there.

Q. While you were present? A. Yes, sir.

Q. Handing you Plaintiff's Exhibit "A" for identification, contained in an envelop, I will ask you to look at this plate and state whether or not that is the plate which you have testified to as having been taken and developed by Dr. Thompson in your presence on the twelfth of January.

A. Yes, sir, it is.

Q. What does that show.

Mr. DONOHOE.—It shows for itself.

Mr. FOSTER.—Well, we offer it in evidence and ask it be marked Plaintiff's Exhibit "A."

Mr. DONOHOE.—We object to its introduction in evidence on the ground that it is not proved to be a picture taken by an operator of an X-ray machine, and has not been properly identified.

The COURT.—I understand he says he saw it taken and developed.

Mr. FOSTER.—Has this been in your possession ever since?

A. It has been in Dr. Beeson's possession. He sent it by registered mail over here.

Mr. DONOHOE.—We renew the objection on the ground that he has not had possession of the picture all the time.

(Testimony of F. J. Sullivan.)

Mr. FOSTER.—Is that the original picture taken in Dr. Beeson's office. [34—18]

A. Yes sir, it is. Every break in the leg is shown in that picture. It is easy to see it. A blind man could see it.

The COURT.—Objection overruled. Exception allowed.

The X-ray is admitted in evidence and will be marked Plaintiff's Exhibit "A."

Q. Has the Blum-O'Neill Company paid you anything as damages or compensation in this matter?

A. I got the month's pay; the month I was working when I broke my leg.

Q. The month of May? A. Yes.

Q. Have they paid you anything other than that?

A. No, sir.

Q. You have claimed damages in the sum of $5,000 for pain and suffering? A. Yes, sir.

Q. Do you consider that would compensate you?

Mr. DONOHOE.—We object to that question—it's improper.

The COURT.—The objection is sustained. Exception allowed.

Q. What kind of a business do the Blum-O'Neill carry on?

A. General merchandise—hardware—furnishings.

Q. A retail business?

A. Wholesale and retail.

Q. What can you say as to the size of the concern?

A. I don't know exactly, but they have been known to do a business of $400,000 or more a year.

(Testimony of F. J. Sullivan.)

Q. Where do they do business?

A. It did business in McCarthy and Chitina and Valdez, I guess. It doesn't now, though—they have sold out.

Q. But where do they do business as a wholesale and retail firm? A. Cordova, Alaska. [35—19]

Q. Any other place where their stuff is sold?

A. All over the territory; in the Copper River valley and to the canneries.

Q. Is it a large concern?

Mr. DONOHOE.—The witness has already testified to that.

Mr. FOSTER.—All right, then.

Q. Are you a married man? A. Yes, sir.

Mr. FOSTER.—That is all.

Cross-examination by Mr. DONOHOE.

Q. Any children? A. No, sir.

Q. Where is the Carlisle business situated to which you were taking these groceries on the morning of the 4th of May? A. On the ocean dock.

Q. How did you reach Carlisle's from the warehouse and store of Blum-O'Neill on the first trip?

A. Well, down B Street to First Street and right on First Street to the dock.

Q. Or you might have gone up B Street to Second and down Second Street to C and then to First?

A. You can go that way.

Q. How much farther is it by going up B Street to Second, up Second to C and down C than it is to go down to First on B and go that way. What's the distance—how much farther?

(Testimony of F. J. Sullivan.)

A. I don't know exactly what the distance would be. It would not be a great deal.

Q. Now you have had considerable experience as deliveryman for retail stores in Alaska, haven't you? A. A little, yes. [36—20]

Q. And you have had quite a lot in Cordova?

A. Yes, sir.

Q. And with that experience in Cordova, you were familiar with the condition of the streets on the fourth of May, 1922? A. I was.

Q. When did you commence working for the Blum-O'Neill Company the last time?

A. I am not sure but I think it was about the first of October—I am not sure about that.

Q. Had you recently returned from Anchorage?

A. Yes.

Q. Who hired you? A. Mr. O'Neill.

Q. H. I. O'Neill? A. Yes.

Q. And where did you draw your pay. Who paid you?

A. Well, I got paid in the store. Everybody got paid there.

Q. With a Blum-O'Neill check? A. Yes, sir.

Q. Now you say you commenced sometime in October, 1921? A. Yes.

Q. You were laid off for a short time after that, weren't you? Between that and the fourth of May?

A. I was off two days.

Q. You were fired, weren't you? Mr. O'Neill discharged you?

(Testimony of F. J. Sullivan.)

A. Not that I know of. I went off a Saturday afternoon and I came back on a Tuesday and he told me to come on Thursday.

Q. Didn't Mr. O'Neill discharge you?

A. Not to my knowledge.

Q. Didn't he discharge you for being drunk?

A. No, sir. [37—21]

Q. Didn't you come back in a few days and tell him that if he would put you back to work you would come?

A. He told me he had put somebody on the wagon that day and there wasn't much doing and for me to come back on Wednesday.

Q. He put you to work again? A. Yes, sir.

Q. If you were not discharged why did you come to him on Tuesday to get the job back?

A. It is quite natural I would some down to go back to work.

Q. Is that your explanation of it?

A. Yes, I came back to work on a Monday; at least I was coming down and I met Harry O'Neill the Sunday afternoon before and I said I was coming back and he said, "I thought you weren't coming to work to-morrow and Jack is going on." So Mr. O'Neill said he put Jack on and it wasn't busy anyway and for me not to come for a day or two.

Q. What time of the day was it that you came down to see Mr. O'Neill?

Mr. FOSTER.—What month did this take place in?

(Testimony of F. J. Sullivan.)

The WITNESS.—It was in February, 1922.

A. I don't know exactly about what time it was —I think it was about ten o'clock.

Q. You usually go to work at eight o'clock don't you? A. Yes, sir.

Q. In your work where do you report in the mornings at eight o'clock with your horses and wagons? A. At the warehouse.

Q. Do you report first at the warehouse?

A. Always.

Q. You are willing to swear positively that you report first at the warehouse?

A. Yes, sir. [38—22]

Q. When did you report at the store?

A. As soon as I got my load on of shorts.

Q. You take a load of shorts from the warehouse down to the store? A. Yes, sir.

Q. What is meant by "shorts."

A. Odds and ends for the counters and shelves, groceries.

Q. The practice there, was it not, that they kept a supply of groceries in the store to fill the small orders with, and the orders such as full sacks or cases you got at the warehouse? A. Yes, sir.

Q. And these shorts were sent down every morning from the warehouse to the store so they would be able to fill small orders? A. They were.

Q. You delivered the groceries locally, all around.

A. Yes.

Q. So we will have this thing straight, I will ask you what would be the disposition of an order If I

(Testimony of F. J. Sullivan.)

should have stepped into that store on the fourth of May, down on the corner of C and First Streets and gave an order for a half dozen of milk; half a dozen corn; couple pounds of bacon; can of coffee, and a sack of flour and a sack of sugar?

Mr. RAY.—We object to that. The witness has not testified as to the conduct of the store.

The COURT.—As I understand it, he delivered from the store also. It is admissible. Exception allowed.

Q. How would it be filled?

A. It would be filled in the store as a general rule, yes.

Q. Is it not a fact that in such an order as that they would fill the small things from the store, and you would go for the sack of sugar and sack of flour to the warehouse?

A. Yes, whichever way was most convenient. [39—23]

Q. They didn't carry a big supply at the store?

A. No, sir.

Q. Was it usual when full sacks or cases were ordered, that you got them at the warehouse and the small things at the store?

A. No, it was usual to get everything at the warehouse except something which people took away.

Q. That was previous to 1921? A. Yes.

Q. Didn't they make a change in 1921?

A. Yes, sir.

Q. After October, 1921, and up to May, 1922, was it the custom when there would be an order turned

(Testimony of F. J. Sullivan.)

in at the store such as I spoke of for shorts and full cases and sacks to get the small things at the store? A. It was.

Q. And you would go to the warehouse for the full sacks and cases? A. Yes, sir.

Q. You delivered from the store as well as the warehouse?

A. Yes, whenever there was anything to deliver from there.

Q. There was more to deliver from the store than from the warehouse, wasn't there? A. No, sir.

Q. How often did you report at the store?

A. I couldn't tell that. I reported whenever they had business for me. If they wanted me they would call up and if Mr. Frederickson wanted me to go, told me to go and get the load out and I would take it.

Q. They had a delivery counter in the store?

A. Yes, sir.

Q. Now, is it not a fact that every morning at ten o'clock you would pick up all the things on that counter, which they would put there for you to take, and deliver to the residences? [40—24]

A. Yes, that's a fact, I would pick those up and then go to the warehouse and pick up the other orders.

Q. You say that was done after the month of October, 1921?

A. That was done up until the day I left.

Q. I thought you said that all the small things

(Testimony of F. J. Sullivan.)

were put up in the store and the other large things in the warehouse?

A. Yes, but the people that call in to Frederickson at the warehouse he put up there.

Q. How many people called in at Frederickson's?

A. I couldn't answer that.

Q. What was the proportion of what called in at Frederickson's and those calling in at the store?

A. It seems to me that there was just as many calls there as they had at the store.

Q. Do you mean to swear to that?

A. I am answering your question, Mr. Donohoe; I was not there all the time. I am just telling you what it seemed to me.

Q. I am just asking you if you mean to tell this jury and Court that there were as many calls in the warehouse as in the store?

A. I think there were more at times and sometimes less—that is what I think.

Q. And there was one man in the warehouse at that time?

A. Well, whenever it was busy there were always three or more.

Q. How many men were working in the warehouse up until the fourth of May?

A. Just me and Mr. Frederickson.

Q. How many men were working in the store, in the grocery department? A. Two men.

Q. Who were they?

A. There was Bob Gunnisen and Mr. Clark, part of the time.

(Testimony of F. J. Sullivan.)

Q. Did you spend a good deal of your time in the warehouse?

A. Why, part of the time. [41—25]

Q. You were delivering some of the time?

A. Certainly.

Q. During this time of your last employment there and up until the fourth of May, 1922, you took orders from the boys in the store as to deliveries, didn't you?

A. As to delivering goods, no, sir, I didn't. No, sir, whenever I had anything to do Mr. O'Neill said I could go to the store and get whatever there was. He told me to go to Frederickson first.

Q. Mr. O'Neill told you to take orders from the boys in the store, didn't he. Didn't he tell you to take the orders out as they told you?

A. No, sir; he told me to take ordes from Mr. Frederickson and anything he had to do, to do it first; and he told me to go down there and do that first.

Q. Now, tell me when that conversation took place? That conversation between you and Mr. O'Neill?

A. When Mr. O'Neill hired me first he told me to go to Mr. Frederickson and he would give me orders.

Q. He told you to go to Mr. Frederickson and take orders? A. Yes, sir.

Q. Mr. O'Neill told you to go to Mr. Frederickson and take orders? A. Yes he did.

(Testimony of F. J. Sullivan.)

Q. Is it not a fact that you had some difficulty with Bud Anderson as to delivering some packages up to the jail and the matter was taken up with Mr. O'Neill and he said you would have to take up the packages or he would have to get somebody else? A. I don't remember that.

Q. You don't remember having trouble with Bud Anderson?

A. I don't remember these things. Anybody might have trouble anytime. [42—26]

Q. Did you have trouble with Bud Anderson about delivering goods from the store?

A. I never had any great trouble with anybody.

Q. Did you have any trouble with him?

A. Not that I know of.

Q. Don't you remember of it having been taken up with Mr. O'Neill?

Mr. FOSTER.—We object to this. He's already said he didn't remember it.

The COURT.—It is admissible only as testing the credibility of the witness. Objection overruled. Exception allowed.

A. No, sir.

Q. Did you haul from the warehouse the goods that went up the railroad when they were sold and shipped on the railroad? A. Sometimes.

Q. Most of the time they were hauled by the Alaska Transfer Co., were they not?

A. Yes, sir.

Q. Just occasionally you hauled them?

A. Yes, sir.

(Testimony of F. J. Sullivan.)

Q. Do you know how Frederickson received those orders for putting up those goods?

A. Most of the time he received them from the store. Whenever they called in there he would get them.

Q. And you would sometimes bring up a memorandum from the store to the warehouse for him to fill? A. Yes, sir.

Q. This Carlisle outfit—goods went to them—do you know how Frederickson got that order?

A. He got that order direct to the warehouse, as a rule.

Q. Do you know how he got that order on the third of May?

A. He got that to the warehouse. He got that from the storekeeper the night before; he got it on the telephone. [43—27]

Q. Do you mean that the storekeeper at the Carlisle Company telephoned it to Frederickson?

A. Yes, he usually did.

Q. Are you willing to swear that that order was telephoned direct from the Carlisle Company and didn't come through the store?

A. That is what the storekeeper told me; that he called up Frederickson so as to prevent delay.

Q. You don't know of your own knowledge that he telephoned Frederickson?

A. That is my knowledge. I am almost positive of it. Most of the time the orders came from there that way.

(Testimony of F. J. Sullivan.)

Q. Will you say that this order didn't come from the Blum-O'Neill store on First Street?

A. I didn't bring it up there. He told me he had it the night before.

Q. Frederickson? A. Yes, sir.

Q. And when you got there he had the load ready for you? A. He did.

Q. And you hauled the load down first and came back for another load? A. Yes, sir.

Q. The first load was principally shorts, small orders, wasn't it?

A. I don't know exactly what it was composed of. Most of it was composed of cases of milk.

Q. What time of the day was it you took the first load down? A. About nine o'clock.

Q. And the second?

A. I don't know exactly, about eleven o'clock; maybe a little afterwards. [44—28]

Q. You and Frederickson were pretty good friends? A. Yes, sir.

Q. Always have been very friendly?

A. Yes, sir.

Q. Frederickson always had a friendly interest in you? A. Yes.

Q. After you were injured he called at the hospital? A. Yes.

Q. Called quite frequently? A. Yes, sir.

Q. And he would sit there and converse with you?

A. He did.

Q. After you got out of the hospital you used to

(Testimony of F. J. Sullivan.)

drop in the warehouse and chat with him occasionally? A. Yes, sir.

Q. And you were always quite friendly?

A. Yes.

Q. Now, Mr. Sullivan, you claim that this load, or that this accident and the injuries you received was due to Frederickson's carelessness, don't you?

A. I didn't put it that way.

Q. That is, you figure that because Frederickson piled this stuff on extra, that is what caused your accident? A. I think so.

Q. It is directly through Frederickson's carelessness that you were injured? A. Yes, sir.

Q. Now when did you first tell Frederickson that it was through his carelessness you were injured?

A. I don't remember ever having told him that.

Q. During all these meetings you never accused him of being [44A—29] responsible for it?

A. Never, only I told him that it was by the way the load was piled on.

Q. You say you remonstrated and argued with him when he told you there was some more goods to go on the wagon and he said you would have to take them or quit and yet, after the accident, when he called on you, you never told him he was to blame for it.

A. He and I, we had a talk about it. I don't remember he called on me after I left the hospital.

Q. You have already testified he called on you for a while? A. Certainly.

(Testimony of F. J. Sullivan.)

Q. And you used to stop up at the warehouse frequently after you got out of the hospital.

A. Yes.

Q. And still you are now willing to swear your leg was broken through his carelessness?

A. I said it was broken because of the way he put too much load on. That is my claim; that is my claim that I hold.

Q. I read from your complaint, paragraph five: "That on said 4th day of May, 1922, at the order of said Fred Frederickson, plaintiff backed said delivery wagon up to the door of said warehouse for the purpose of taking a load of groceries to the main store of plaintiff. That when said wagon was full and no more could be safely placed thereon, plaintiff started to drive away. That when plaintiff had proceeded about twenty feet from the said warehouse door, said Frederickson called for him to stop and against the remonstrances of plaintiff, piled seven cases of milk and eggs on and in front of the seat of said wagon. That by reason of the placing of said additional cases of produce on said wagon, plaintiff had no safe place to sit nor had he any safe place from which [45—30] to control the said horse of defendant. That plaintiff so informed the said Frederickson, agent of defendant as above stated, but said Frederickson said that the goods would have to go. Before plaintiff could get down from the wagon or remove himself to a safe place, said horse started down said hill and the boxes piled in the front of said wagon by said

(Testimony of F. J. Sullivan.)

Frederickson slid forward and over the dashboard, striking the horse and causing him to become frightened" and so on— Now, it is your contention that Frederickson's carelessness and recklessness in putting your load there caused your injury?

A. Yes.

Q. And still you were friendly with him right afterwards when he called at the hospital?

A. Yes.

Q. I will ask you if the second day after you were in the hospital, in the town of Cordova, Territory of Alaska, you and Fred Frederickson being present and no other person being present, the following conversation, in words to this effect, took place: "Frederickson said, 'Sully, how did the accident happen? Was the horse to blame?' and you replied: 'The horse was not to blame. It was the street that was to blame.' "

A. Not that I know of. That's news to me.

Q. Now, I believe you stated in your direct examination that Frederickson took in about forty or fifty dollars a day at the warehouse. How do you know that?

A. That is what I figured it. There is no settled account in any store, of course.

Q. He might have only taken in $5.00 as far as you know? A. It isn't likely.

Q. Are you sure he took in $30 or $40 a day?

A. I think he did. Sometimes it was more than that, sometimes less. [46—31]

Q. What makes you think it?

(Testimony of F. J. Sullivan.)

A. Because I seen the girl take away more and less than that. The bookkeeper came up and took the charge slips away and any money that was taken in.

Q. Do you know who hired Frederickson?

A. I wasn't there then.

Q. Did you see Mr. O'Neill there quite often?

A. He would come up there on busy days to work with Bud Anderson.

Q. That was previous to the change in the system when they used to put up the shorts in the warehouse and before they put up the shorts at the store? In other words, did you see Bud Anderson or Mr. O'Neill put up any goods after the first of the year 1922? A. Yes, sir.

Q. When?

A. Well I don't know just when. On train days Mr. O'Neill, Harry and Bud Anderson, all three would come up to help out.

Q. Come up to help out? A. Yes, sir.

Q. Did you see Mr. O'Neill there any other time?

A. Sometimes, yes.

Q. Is it not a fact that he used to visit there every day? A. No, sir.

Q. How many days a week?

A. Sometimes, maybe, once a week.

Q. How do you know whether he would be there. You were away a good portion of the day?

A. He could have been there while I was some other place.

(Testimony of F. J. Sullivan.)

Q. Yet you are willing to say he was not up there? A. I never said that.

Q. How many trucks did they have in the warehouse for piling on goods?

A. Four delivery trucks, I think so. [47—32]

Q. That is these trucks that have two wheels in the center and a wheel on each end? A. Yes, sir.

Q. What other duties did you say Frederickson had besides putting up groceries?

A. Well, I guess he would have the duties of any salesman, to take orders.

Q. You are bearing down pretty heavy on the salesman. Did you consider him a salesman or a warehouseman?

A. I think he was a good salesman. One of the best. That was his reputation around there.

Q. Did you consider his position that of salesman or warehouseman?

A. I think just like a man in charge of any place. He was considered the foreman of the warehouse.

Q. Did he attend fires to keep the temperature right, to protect the goods from freezing, and keep the place in shape that way.

A. I didn't take any diagram of what he was doing.

Q. Did he attend the fires and keep the temperature of the warehouse proper?

A. I think he did.

Q. And he checked up on the goods to find out if you were running low on any lines?

A. Yes, sir.

(Testimony of F. J. Sullivan.)

Q. And if orders were sent up from the store he would fill the orders? A. He would.

Q. And you would deliver them if they were local orders? A. Yes.

Q. And that is the way you would get your orders—from the store? A. Yes. [48—33]

Q. Any orders turned in at the store that were to be filled up at the warehouse, you would either bring a memorandum with you or they would telephone to Frederickson? A. Yes, sir.

Q. And you called and got those orders and distributed them around the town? A. Yes, sir.

Q. Do you know where this milk was piled in the warehouse? A. Yes, sir.

Q. Whereabouts was it?

A. Well, it was straight back from the door.

Q. Just across the warehouse? A. Yes.

Q. About fifty feet from the door?

A. I don't know how many feet.

Q. It was about fifty feet wide? A. Yes, sir.

Q. I notice you say in your complaint you piled on some eggs but in your testimony you say it was butter; which was it?

A. It might have been both. I know there was a case of butter under my feet.

Q. You wouldn't recognize the difference between butter and eggs?

A. I would, but as far as I know it was milk and butter. That is what I thought it was.

Q. I wanted to know which it was. In your

(Testimony of F. J. Sullivan.)

complaint it is eggs and in your testimony you say butter. Just explain that?

A. I couldn't swear to it. I know I had four cases of milk and one case of butter.

Q. Is there any great difference in a case of butter and a case of eggs?

A. There is. [49—34]

Q. What is the size of a case of butter, length and width?

A. I don't know the length and width of it.

Q. Do you know the length of a case of eggs?

A. No, I don't.

Q. Do you know the length and width of a case of milk? A. No, sir.

Q. Where was the butter piled in the warehouse?

A. Right inside the door a little ways.

Q. As I understand it, you went to the warehouse on the 4th of May, 1922, went up to the warehouse and got a load of goods that you took to the Carlisle Packing Co. about nine o'clock in the morning, and then you came back? A. Yes, sir.

Q. What route did you take coming back to the warehouse?

A. I went around First Street and up B.

Q. You are quite positive you didn't come by way of C Street to Second and along Second to B, and down B? A. I am.

Q. There was considerable snow on the lower part of B Street, wasnt there? A. Yes.

Q. And there was a cut shoveled out partly there?

(Testimony of F. J. Sullivan.)

A. I don't know—I don't remember that. There was a passage there the city had cut out.

Q. How deep would you say the snow was on that track or trail? A. I can't tell you that.

Q. There was quite a little snow there?

A. Yes, sir.

Q. Now, when you came back Frederickson had the load ready for you on the truck?

A. Yes, he did.

Q. Do you know what the load consisted of?

A. There was a general load. [50—35]

Q. You have testified there was sixteen or seventeen hundred pounds. What did it consist of?

A. Sure, I don't know exactly what it was, Mr. Donohoe. It was a general load of groceries. I didn't take count of it.

Q. I will ask you if there was six cases of eggs?

A. I can't tell you what was in there.

Q. You can tell about the additional things that were put on but you can't tell anything at all about what made up the sixteen or seventeen hundred pounds load you testified there was on the wagon before that, is that right?

A. Well, that was before the accident and I didn't pay any attention to what it was.

Q. I'm asking you if there was six cases of eggs in that load? A. I don't know how many.

Q. How many cases of toast were there?

A. I don't know.

Q. And still you are willing to swear it weighed sixteen or seventeen hundred pounds.

(Testimony of F. J. Sullivan.)

A. I can tell from the load on my wagon. I considered the load was between fifteen and seventeen hundred pounds. I never weighed these things; I just take it from what is in a load. I can pretty nearly tell. I know my wagon will hold from fifteen to seventeen hundred pounds and if I had any room left I would have no occasion to put it in the seat.

Q. You are willing to swear that there was sixteen or seventeen hundred pounds in the load and you can't name any of the articles?

A. Well, I'm not a prophet, Mr. Donohoe. I would have quite a memory if I could remember what was in every load I took out.

Q. I will ask you if that load didn't consist of six cases of milk; six cases of eggs; four cases of toast; one sack of split peas and one sack of Jap rice. A. I couldn't tell you. [51—36]

Q. And do you know what a case of eggs weighs?

A. Yes, about sixty pounds.

Q. Do you know what toast weighs?

A. Toast—it doesn't weigh much.

Q. About thirty-four pounds?

A. I imagine that would be about it.

Q. And a sack of Jap rice weighs about how much? A. Either fifty or a hundred pounds.

Q. And this was a hundred pound sack?

A. Yes, sir.

Q. And do you know what a sack of split peas weighs?

A. Split peas—they come in fifties and hundreds.

(Testimony of F. J. Sullivan.)

Q. And you are willing to swear to this jury that there was sixteen or seventeen hundred pounds on that wagon? A. To the best of my knowledge.

Q. And you are basing your knowledge when you don't know the contents of the load?

A. No, I know the wagon was full.

Q. And you can't say what was on it?

A. I can't.

Q. From just looking at the load you say there was sixteen or seventeen hundred pounds?

A. Yes.

Q. That is the best you can say on that question.

A. Yes, sir, it is.

Q. Now, you say that Frederickson piled four cases of milk on the seat after you already started away? A. Yes, sir.

Q. How did he pile them?

A. He put them on the footboard. He kept piling them up on it and he threw them to me.

Q. He shoved them to you and you piled them up? A. Yes, sir. [52—37]

Q. How long did it take to put those on?

A. I don't know.

Q. Well, how long would it take?

A. Oh, I guess about five minutes; not that long, three minutes.

Q. And he shoved them onto the footboard and you put it on the seat? A. Yes.

Q. He shoved seven cases that way?

A. I don't remember seven cases. I know I had

(Testimony of F. J. Sullivan.)

four cases of milk on the seat and three cases of butter. Well, that's what I think it is, yes.

Q. How long is that seat?

A. I don't know the length of that seat. I don't know just how long it would be. Room for probably three people to sit.

Q. Would you say it was more than thirty-six inches long?

A. Probably thirty-six or forty inches.

Q. Do you know the dimensions of a case of milk?

A. I guess a case of milk; I imagine it would be twenty-four inches to two and a half feet long.

Q. How wide?

A. About—I don't know exactly, but I imagine about eighteen inches wide.

Q. And how high? A. About the same height.

Q. Now, there was four cases put on and you were sitting in the middle of them in the seat?

A. Yes, sir.

Q. Two, one on top of the other, on each side of you? A. That is my recollection of it. [53—38]

Q. That is your recollection of it?

A. Yes. If I knew that I was going to have an accident I would have taken notice of it. I didn't know there was going to be an accident. That's the way I remember it.

Q. You have a pretty good memory for most things, Sully? A. I have a pretty good memory.

Q. You are not feeble-minded or anything like that? A. No.

Q. Now, on a seat not to exceed forty inches long

(Testimony of F. J. Sullivan.)

you had two cases of milk on each side of you and those cases were, as you say, two and a half feet long and eighteen inches wide, which would give you about four inches to sit on if you were between those two cases and you say you were. Is that true? Do you want this jury to believe that?

A. It is not likely I was sitting on four inches.

Q. Is it not a fact that after you got that load on there that you said to Frederickson that they wanted a case of milk down at the store and you went in and got it and drove down to the store?

A. No, I never got to the store, and I didn't get any case of milk. Frederickson brought out the stuff.

Q. How did Frederickson bring this to the wagon?

A. He brought it in a truck and just threw it on the footboard.

Q. And you put it on the seat? A. Yes, sir.

Q. And still you plead that you didn't have time to get down off the wagon? A. I didn't.

Q. But you had time to get the milk and put it up alongside of you?

A. I put it outside of the way in the seat. [54—39]

Q. Now, Mr. Sullivan, you say Mr. Frederickson brought out this milk. State where he got this milk to put on the wagon that you testified to?

A. He got it in the warehouse.

Q. Did he get it after you drove away?

A. After I drove away.

(Testimony of F. J. Sullivan.)

Q. That is, after you drove from the warehouse door?

A. He must have. He told me to wait a while, that he had some more stuff to go.

Q. How long did you wait there?

A. A very short time.

Q. Who did you first tell that this accident was caused by Frederickson putting on this additional load?

Mr. RAY.—We object to that as improper cross-examination.

The COURT.—Objection overruled. Exception allowed.

A. The first one I told that to was Mr. Meyer Blum. He was up to the hospital to see me. He agreed I had too much load on.

Q. When was this?

A. Three or four days after the accident.

Q. You told Mr. Meyer Blum that your injury was caused by Frederickson overloading the wagon?

A. It was in the conversation.

Q. You told Mr. Meyer Blum that you received your injury because Frederickson had put too much stuff on the wagon?

A. Yes, that is just what it consisted of, that's it; and I had the same talk with him afterwards.

Q. And still you would go around and visit Frederickson at the warehouse?

A. I don't claim he had any intention that I was going to have that accident; still I had to do what he told me. [55—40]

(Testimony of F. J. Sullivan.)

Q. But you don't hold anything against Frederickson? A. I don't.

Q. Because he hasn't money to respond?

A. I don't quite see what you are getting at, Mr. Donohoe.

Q. Don't you feel that the accident occurred through Frederickson's carelessness?

A. Yes, and that's the reason why the Blum O'Neill Company ought to be responsible for it.

Q. Do you feel that the accident occurred through Frederickson's carelessness? A. I do, yes.

Q. And you never felt sore at him on that account? A. I can't say I never felt sore at him.

Q. You never felt he was to blame for your injury; told him that his overloading you was the cause of the accident.

A. I told Frederickson what I thought the cause was; how the place was. Of course, a part of it was caused by the snow and condition of the street, but I told him that the stuff that crowded me off the seat—the weight was responsible.

Q. Do you remember having a conversation with Frederickson in which you stated that you were going to try and hold the Blum-O'Neill Company for the accident, on the streets of Cordova one evening when he was walking home in the end of August, 1922? Do you remember having a conversation with Frederickson on this subject at that time?

A. Yes, sir.

Q. I will ask you if at that conversation which took place on the streets of Cordova, about the latter

(Testimony of F. J. Sullivan.)

part of August, 1922, yourself and Mr. Frederickson being present and none others, that you made this statement in language to this effect: "You said to Frederickson that you felt that the city should [56—41] pay you for the accident on account of the poor streets and you also thought that the Blum-O'Neill Company were responsible to you for the accident and should pay you something."

A. No, sir; I didn't say any such thing. There was a conversation and I told Mr. Frederickson that I thought the Blum-O'Neill Company was responsible for my accident owing to the way it happened and Frederickson insisted he thought the city was. That was the only conversation we had on that day.

Q. That was the first conversation; the first time you had spoken of holding Blum-O'Neill?

A. We talked about the accident many times.

Q. You fully realize you can't make the Blum-O'Neill Co. pay you unless it is on account of the carelessness of Frederickson, don't you?

A. I don't know anything about law; I am not a lawyer.

Q. You are coming into court without knowing anything about how to proceed to establish your case, is that it? A. No, sir.

Q. Now, what is the space between the front of this wagon—the seat on this wagon and the dashboard? A. The space?

Q. Yes. A. I don't know exactly.

Recess until 1:30 P. M.

(Testimony of F. J. Sullivan.)

The WITNESS.—There was a statement I made this morning about the case of milk that I measured; I was entirely wrong. I gave the wrong measurements on it. [57—42]

Mr. FOSTER.—He just wants to correct a statement he made at that time.

The COURT.—Very well, he may do so.

The WITNESS.—It is regarding the case of milk. It is nineteen and a half by twelve and a half by nine and a half feet high.

Q. I want to go over the question of the loading of the wagon with you. You have had considerable experience in delivering goods from the stores, haven't you? A. Yes, sir.

Q. You know how to load a delivery wagon?

A. I pretend to.

Q. You state that Mr. Frederickson had instructed you how to load the wagon. Did you need any instructions?

A. I said he did whenever we had a big order. He also told me the best way as to how to put on the most. He arranged it and so he told me how to load it.

Q. He told you how to load the wagon?

A. Yes, sir.

Q. Was not your experience sufficient to tell you how to load the wagon to the best advantage?

A. Well, I could load a wagon. Of course, I could. I didn't say I couldn't.

Q. How did Frederickson bring the extra cases out to the wagon. Those extra cases of milk and

(Testimony of F. J. Sullivan.)

butter you spoke about. Did he carry them out in his hands? A. Certainly.

Q. Where did he get them from?

A. The truck at the door.

Q. How many did he carry at a time?

A. One. [58—43]

Q. I believe you say you protested against him putting on the extra stuff? A. Yes, sir; I did.

Q. What did you say?

A. I told him the wagon was loaded and there was no more could get on—if he found room to put them on.

Q. What did he say?

A. He said he would put them on the footboard.

Q. Did he say anything else?

A. No, sir; he just carried them out and put them on the footboard.

Q. He placed them on the footboard and you put them on the seat?

A. Yes, he put two on the seat and I put the rest.

Q. How could he reach up on the seat. How much higher was it than to the footboard?

A. Oh, anybody could throw a box on the seat. I put the ones further up myself.

Q. You don't mean to say that Frederickson said if you didn't take the load down you could quit?

A. Yes, he did.

Q. Are you sure he said that?

A. That is what I understood him to say.

Q. And he insisted that you should take this down? A. Yes, sir.

(Testimony of F. J. Sullivan.)

Q. And he said if you didn't you could quit?

A. Something similar to that.

Q. That is what you understood him to say?

A. Yes.

Q. And did you tell him that it was too big a load to go down that street where the snow was on?

A. Why, I was satisfied I could take the load down if I hadn't the load on the footboard and the seat.

Q. How long was he getting those cases from the back on to the truck? [59—44]

A. It might be a couple of minutes.

Q. He travelled twenty feet out and twenty feet back in seven times, that's forty feet seven times or two hundred and eighty feet. He made seven trips, didn't he? And you say he did that all in a couple of minutes.

A. I don't know; I didn't measure the trips.

Q. You say the wagon was twenty feet away from the door when you stopped?

A. Yes, I thought it was.

Q. Where were you when he first started to put the first case of milk on the wagon?

A. On the seat.

Q. On which side of the seat?

A. I was on the right side of the seat.

Q. On the right side? A. Yes.

Q. And the left-hand side, was it put on the left-hand side?

A. He just threw them on the footboard.

Q. And you put them on the seat?

(Testimony of F. J. Sullivan.)

A. Yes, sir.

Q. Was that done with all of them. Where did he put the three cases of butter?

A. On the footboard.

Q. And were they piled on the footboard one on top of the other?

A. There was one under my feet and the other two were on the left-hand side.

Q. How wide is the footboard?

A. I didn't measure it.

Q. There is no dashboard on this wagon?

A. Dashboard?

Q. Yes. A. No, sir. [60—45]

Q. Would you say the footboard was more than nine inches wide?

A. I couldn't tell you; I didn't measure it.

Q. Now, Mr. Sullivan, you testified something about the horse and wagon; who instructed you to take the horse and wagon this morning, if anybody.

A. I was instructed the night before. Mr. Frederickson told me.

Q. Where was he when he told you that?

A. In the warehouse.

Q. You were using a double-ender at that time?

A. Yes, sir.

Q. Is it not a fact that Mr. O'Neill spoke to you the morning of the third about hitching the horse to the wagon? A. Yes, sir.

Q. That everybody else was on wheels in the town?

(Testimony of F. J. Sullivan.)

A. I was told about that several times.

Q. Just answer my question; didn't Mr. O'Neill tell you on the third day of May that everybody was on wheels and that you ought not to be dragging that sled over the ground?

A. He told me on the second day of May that.

Q. Didn't you tell him on the 3d day of May that Jerry O'Leary was fixing the wagon and would have it ready in a day?

A. Jerry O'Leary wasn't fixing the wagon.

Q. You told him that? A. Yes.

Q. And you told him it would be ready to-morrow? A. I didn't tell him that.

Q. And when Mr. O'Neill asked you on the third day why you didn't take the wagon that everybody was on wheels you told him that Jerry O'Leary was fixing it.

A. No, sir; I told him the snow was too deep.

Q. Wasn't everybody else on wheels at that time?

A. Everybody with big wheels. The big wagons with big wheels. [61—46]

Q. Wasn't First Street practically bare of snow?

A. Yes, sir.

Q. Was the road down to the ocean dock clear?

A. There was deep snow on the hill.

Q. How deep? A. I don't know.

Q. You didn't have any difficulty in getting the wagon down with the first load, did you?

A. I just barely made it, that was all.

Q. Now do you mean to say that you never went

(Testimony of F. J. Sullivan.)

to Mr. O'Neill for orders; instructions about anything connected with the business?

A. I never went to Mr. O'Neill on the general delivery system, never.

Q. Never asked Mr. O'Neill for instructions on anything?

A. Many's the time I asked him for instructions on things.

Q. Now, what are they? What did you consult him about?

A. I don't know. I can't mention anything in general now. I never went to him regarding deliveries though. I couldn't go there every time—he had men to look after that.

Q. But you knew he was the general head of the whole concern? A. Yes, sir.

Q. He was general superintendent of the whole proposition? A. Yes, sir.

Q. Over at the warehouse and store and stables, he was general superintendent, manager—wasn't he?

A. Yes, sir; that is what I took him to be.

Q. How many men were working under Frederickson during the entire month of April, 1922, and up to the fourth day of May, 1922, in the warehouse?

A. Three days a week there was always two or three. Other days there was only me and him. [62—47]

Q. Do you mean to swear that there were two or three men up there working in April, 1922?

(Testimony of F. J. Sullivan.)

A. Of course, I mean to say that.

Q. Who were the men who were there?

A. They weren't connected with the warehouse; Bud Anderson, Harry O'Neill and sometimes an extra man, which Frederickson would get himself.

Q. They would come up from the store?

A. Yes, on the busy days.

Q. Mr. O'Neill would come up? A. Yes.

Q. And Mr. Anderson? A. Yes.

Q. And young Harry O'Neill—Mr. O'Neill's son?

A. Yes.

Q. They would come up and help you and Frederickson to put up goods going out on the train?

A. Certainly.

Q. Now, you said something about Frederickson hiring and firing some men. Did I understand you correctly in that?

A. I didn't say that. I said if we were busy and needed somebody and he knew some men he would hire them.

Q. How did you know he hired them?

A. No more than I seen it myself.

Q. Did you hear a conversation? A. Yes, sir.

Q. Who did he hire? You can't name a single person he hired, can you?

A. There were several people that lived up there in cabins that he knew. I didn't know them only to see them.

Q. Can you name a single person that Frederickson hired?

(Testimony of F. J. Sullivan.)

A. I don't remember their names, no sir. [63—48]

Mr. FOSTER.—What did you mean by "several people that lived up there in cabins" being hired by Frederickson?

A. It was always people not working around there. Fellows living in cabins; any body that came around there; Frederickson would hire them and settle up with them.

Mr. FOSTER.—I wish you would describe this delivery wagon again?

Mr. DONOHOE.—I submit this has all been gone over.

The COURT.—Yes, unless there is some testimony the witness wishes to make clear.

The WITNESS.—The only thing in the delivery wagon I have been mistaken in is that the tires were an inch and a half and not two inches wide. Outside of that it is a standard delivery wagon.

That is all.

Witness excused. [64—49]

Testimony of Betty Satterlee, for Plaintiff.

BETTY SATTERLEE, called and sworn as a witness in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FOSTER.

Q. What is your name? A. Betty Satterlee.

Q. Where do you reside? A. Cordova.

Q. How long have you lived in Cordova?

A. About six years.

(Testimony of Betty Satterlee.)

Q. Are you acquainted with Florence Sullivan, the plaintiff in this case? A. I am.

Q. Are you acquainted with the firm of Blum-O'Neill? A. I am.

Q. Do you know where their place of business is?

A. Yes, sir.

Q. Do you know where the building known as the Blum building is? A. I do.

Q. Calling your attention to the fourth of May, 1922, what were you doing at that time, on that day?

A. I was working for the tailor shop, Lien's tailor shop on First Avenue.

Q. I will ask you, Mrs. Satterlee, to look at this map or plan; this being the Blum building; this is the Blum-O'Neill store and this is First Avenue. Now where is Lien's tailor shop on that map?

A. Right on the corner of First Avenue and B.

Q. I will ask you what kind of a door the shop has. How is the door built there? [65—50]

A. It is cut right across the corner like that. It faces the street looking this way (indicating).

Q. Single or double door?

A. It is a double door.

Q. Glass door? A. Yes, sir.

Q. On the fourth of May, 1922, what was the weather in the morning, warm or sold?

A. The sun was shining and it had been thawing, I think.

Q. What were you doing at that time?

(Testimony of Betty Satterlee.)

A. I was sitting there waiting for work and looking out.

Q. At what time was this?

A. Between eleven and twelve o'clock.

Q. As you sat there between eleven and twelve o'clock, what did you do, if anything?

A. Well, I noticed the wagon.

Q. What wagon?

A. The Blum-O'Neil delivery wagon. Sully was on it. It was at the top of the hill just ready to come down the hill and I noticed the wagon being loaded pretty heavy or loaded high, but it was a very large load I thought to myself; and Sully was sitting there, and the horse had just started as I looked up. Sully had his hands on some high boxes; he had the lines in one hand, I think, and he was holding the boxes with the other.

Q. Just tell what happened?

A. The horse started and he hadn't gone but a little ways until there was a box fell off the part of the wagon which struck the horse and frightened the horse and he plunged, and with that it jerked Sully out with a couple more boxes and he fell between the horse and the wagon, the [66—51] front wheel running over him, and then as I saw that I screamed for help and I rushed out to the cross street at the foot of the hill and with that Sully was being dragged and got between the wheels, and the way the snow was in the street in the bank on one side he was caught in between them and rolled down to the foot of the hill; then

(Testimony of Betty Satterlee.)

the hind wheel ran over him and the horse went down the street. I picked Sully up and held him.

Q. Do you trade with the Blum-O'Neill Company? A. I do.

Q. How long have you been doing so?

A. Ever since I have been in Cordova.

Q. What has been your occupation?

A. I ran a little bakery there for quite a while, up until a year and a half ago when I sold out.

Q. But since October 1, 1921, with whom did you trade? To whom did you give your orders?

A. I usually went to the warehouse and in fact when I bought anything from the Blum-O'Neill Co. at that time I always went to the warehouse after it.

Q. Who did you trade with at the warehouse?

A. Fred Frederickson.

Q. Was it your custom in trading at the warehouse to ring up the main office or the warehouse?

A. I would ring up the warehouse, but I usually went in person to the warehouse.

Q. What kind of a stock did they have at the warehouse, do you know?

A. Everything in the grocery line.

Q. Do you know whether they had furniture in the same building?

Mr. DONOHOE.—We object to any further questions on this line as not tending to prove any of the issues in the [67—52] pleadings. There is no issue that Frederickson was the head of a sepa-

(Testimony of Betty Satterlee.)

rate department and that is what this testimony is attempting to prove.

The COURT.—I think it should stop with the testimony about the groceries. There is no furniture in the case. The objection is overruled. Exception allowed.

A. Yes, sir; there was.

Q. Did you ever purchase any of that or deal in the furniture department?

Mr. DONOHOE.—We make the same objection on the same grounds.

The COURT.—The objection is overruled. Exception allowed.

A. Very little, I never bought very much furniture other than some linoleum.

Q. With whom did you deal?

A. Fred Frederickson.

Q. Was there any other person there in charge of those things besides Frederickson?

A. At one time there was a Mr. Philips there.

Q. But from October 1, 1921?

A. I think Fred was the only one there since then.

Cross-examination by Mr. DONOHOE.

Q. On which end of the seat of this wagon was Mr. Sullivan sitting at the time you first saw him at the warehouse?

A. I don't know just exactly, but I know he had his right hand over these boxes.

Q. His right hand?

(Testimony of Betty Satterlee.)

A. Yes, sir; and he was holding the horse with his left hand as he came down the street.

Q. Did you say he fell somewhere along about the upper end of the Laurie building, right beside that?

A. Well, I would judge it was about the middle of the distance— [68—53]

Q. Between the warehouse and First Street?

A. Yes, I don't know just exactly.

Q. When you were doing this trading, you were running a restaurant at that time?

A. A bakery.

Q. Whereabouts was your bakery?

A. It was in the Lewis building on First Avenue by Wilsons.

Q. Most of these orders you turned in to the warehouse were for full boxes or cases, weren't they? A. No, sir; not always.

Q. Didn't you sometimes order a sack of flour or a sack of sugar?

A. Yes, sir; but we usually bought on a very small scale.

Q. How came you to get in the practice of going to the warehouse and not the store?

A. It was nearer. The real reason was because we liked Fred Frederickson and we rather deal with him.

Q. You would rather deal with him than Bud Anderson, is that it? A. Yes, sir.

Q. Frederickson was quite a friend of yours?

(Testimony of J. L. Bulkley.)

A. Yes, I liked Fred.

Mr. DONOHOE.—That is all.

The witness excused. [69—54]

Testimony of J. L. Bulkley, for Plaintiff.

J. L. BULKLEY, called and sworn as a witness in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FOSTER.

Q. What is your name? A. J. L. Bulkley.

Q. Are you a regularly licensed physician and surgeon in the Territory of Alaska? A. I am.

Q. Graduate of a medical school?

A. Yes, sir.

Q. What school?

A. Syracuse University, New York.

Mr. DIMOND.—We will admit he is fully qualified as a doctor.

Q. Have you in the past week made an examination of the plaintiff in this action, Sullivan?

A. Yes, sir; but not in the past week.

Q. In the past two weeks?

A. I think it was previous to that. It was before that.

Q. How long ago? A. That I cannot state.

Q. Since the first of the month?

A. I think so, I could not state that positively.

Q. You made a thorough examination of his leg? A. I did.

Q. Handing you Plaintiff's Exhibit "A," I will ask you to examine that exhibit. From the exami-

(Testimony of J. L. Bulkley.)

nation you have made of plaintiff's leg what have you to say as to that film?

Mr. DIMOND.—Object to the question as the witness has not shown himself competent to testify as to the film; and we raise the same objection to this testimony as to the film [70—55] because Dr. Beeson is not here to testify as to its taking and the testimony is mere hearsay. The witness Sullivan is not competent to identify it.

The COURT.—The latter part of the objection as to the identification of the plate is overruled.

Mr. FOSTER.—They have already admitted he was qualified.

Mr. DIMOND.—I will admit Dr. Bulkley can take X-ray pictures and is generally qualified as a physician.

The COURT.—Very well, you may qualify him.

Mr. FOSTER.—Have you ever taken X-ray pictures? A. I have.

Q. Have you in your practice seen many X-ray pictures?

A. I have seen some X-ray pictures; I do not know whether you would call them many.

Q. Are you familiar with the anatomy of the human form? A. Yes, sir, supposed to be.

Q. From your experience as a physician and surgeon, and from your examination and study of the X-ray, can you take a picture such as you have and from that state the general characteristics of the leg from which it was taken—the condition of the bones? A. I think I can, yes, sir.

(Testimony of J. L. Bulkley.)

Q. You may state what that picture shows to you.

Mr. DIMOND.—Same objection.

The COURT.—Overruled. Exception allowed.

Mr. FOSTER.—Taking into consideration your physical examination of the plaintiff.

A. I believe this X-ray negative to be a picture of the leg that I examined.

Mr. DIMOND.—We move that the answer be stricken. We will admit his general qualifications, but he has not shown his qualifications to testify as to this particular picture. [71—56]

The COURT.—I am not certain about his knowledge; but it has been testified by Mr. Sullivan it is the plate taken by Dr. Beeson of his leg.

Mr. FOSTER.—It has been admitted in evidence as the picture of Sullivan's leg which was taken.

The COURT.—Mr. Sullivan testified that he was present when this was taken; that the plate was developed by Dr. Beeson and he mailed it over here himself. Dr. Bulkley here testified he has examined Mr. Sullivan's leg. I don't think he should testify as to what he found from examining Mr. Sullivan's leg in connection with what the plate shows. I think they are separate.

Q. What did you find from that plate. What does that show as to the condition of the leg?

Mr. DIMOND.—We object to the question. If he made the plate he could have testified from it.

The COURT.—The objection is overruled. Exception allowed.

A. Fracture of both bones.

(Testimony of J. L. Bulkley.)

Q. Recent or somewhat long standing?

Mr. DIMOND.—Same objection.

The COURT.—The objection is overruled. Exception allowed.

A. I am unable to say. I don't think anybody could say that.

Q. What can you say as to the knitting or condition as shown by that plate of those bones?

Mr. DIMOND.—I wish the record to show that our objection goes to all the testimony of Dr. Bulkley about this plate.

The COURT.—Yes, it is understood all this goes in under objection.

Q. I will ask you this first: From your examination of Sullivan, what do you find as to the present condition of his injured leg, his maimed leg? [72—57]

A. The leg itself is crooked. The bone is set. While it is set in fair alignment it is not set in perfect alignment. The upper fragment is anterior to the lower fragment. It is forward, shoved down and sort of projects.

The COURT.—Is there anything in the pleadings about improper setting?

The WITNESS.—Why, that is not my attempt; I don't say it was an improper setting. In fact, I think it was set very well.

Mr. DIMOND.—We move to strike all this testimony on the ground that there is no foundation for it in the pleadings. The pleadings show he suffered a compound fracture of the leg and was compelled

(Testimony of J. L. Bulkley.)

to pay doctor and hospital bills in the amount of $418; that he has suffered loss of wages in the sum of $150 a month; that he will be crippled for a year from the date of his injury and has suffered pain and anguish There is nothing about any malformation of the leg.

Mr. RAY.—It is alleged in the prayer for damages that the crippled condition will probably continue for a year, and the doctor is asked to describe the condition which he finds at this time. It is merely preliminary to further questions as to the time of recovery from the accident of the crippled condition, and the time before the leg will be entirely well. It leads up to the testimony which goes to cover that particular element of damage.

The COURT.—The motion is denied. The jury will be specially instructed about that. Exception allowed.

Q. From an examination you have made of the plaintiff in this action would you say he is at this time able to do manual labor?

A. In my opinion he is not. [73—58]

Q. In your opinion how long, approximately, will it be before he can do the work of a laboring man, the ordinary common laborer. I am not asking you exactly.

A. I think from the condition of his leg that I would not expect him to do heavy manual labor for six months.

The COURT.—From this time?

A. Yes.

(Testimony of J. L. Bulkley.)

Cross-examination by Mr. DIMOND.

Q. I think you said in your direct examination that from your inspection of the plaintiff's leg you found a fracture of both bones?

A. That is correct; yes, sir.

Q. Present existing fracture?

A. No, previous fracture.

Q. And the bones have united?

A. To a certain extent. It is hard to say exactly how much.

Q. Do you find a callous? A. On both bones.

Q. Upon what do you base your opinion that plaintiff will not be able to perform labor for about six months?

A. The apparent weakness of the leg. I made up my mind from manipulations of the leg and the way he walked when he is bearing his weight on that leg.

Q. Do you mean the weakness of the bones?

A. Well, the effect of the weight on the bones.

Q. Do you find any motion that would proceed from the fracture? A. No, no motion.

Q. The bones are as strong as they were before the fracture, are they not?

A. I could not make any impression other than that of weakness on handling. [74—59]

Q. A weakness of the bones?

A. The only way that could be shown would be by the X-ray. That's the only way you could tell that. In handling it caused him pain—

Q. That would be subjective or objective symp-

(Testimony of J. L. Bulkley.)

toms. Which would that be, Doctor, subjective or objective symptoms?

A. They would be subjective symptoms.

Q. In other words, he told you it caused him pain when you attempted to manipulate the bones?

A. Yes, sir.

Q. And so far as you know, are able to determine from your own manipulations, aside from the statement of the plaintiff made to you, they are just as strong as before the fracture?

A. I would say so, yes.

Q. You are not basing your opinion upon any muscular weakness in the leg? A. No, sir.

Q. Did you make any examination of Mr. Sullivan before the fracture? A. No, sir.

Q. And you don't know when the injury occurred? A. No, sir.

Q. And are you prepared to say, Doctor, that the results that you observed from this leg were not caused by failure to take care of it after it was broken and not by the original fracture?

A. I have no means of knowing.

Q. Is that leg shorter than the other?

A. I did not measure it. I think it must be on account of the position of the bones.

Q. Do the bones overlap?

A. There seems to be a slight overlapping. I should judge it was an oblique break. It is exceedingly difficult to get a perfect union where there is an oblique break. [75—60]

Q. How far would you say the bones have pro-

(Testimony of J. L. Bulkley.)

ceeded further away? A. About a half an inch.

Q. I think you said the leg was crooked. Is it in fact twisted in or out, or is it in imperfect alignment? A. In imperfect alignment.

Witness excused.

Plaintiff rests.

Mr. DONOHOE.—In making a strenuous effort to get through this case to-day, I want to make a motion at this time. I do not care to argue it. The reason for making it at this time is to preserve the record.

Mr. DONOHOE.—Comes now the above-named defendant and moves this court for an order granting a nonsuit against the plaintiff and dismissing the case on the following grounds:

1. The complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant in this, that the plaintiff in his complaint has failed to plead facts sufficient, if true, to make Fred Frederickson a vice-principal of said defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

2. That plaintiff has wholly failed by his evidence to prove that the said Fred Frederickson acted as vice-principal in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

3. That it is clearly shown by plaintiff's testimony that if said Fred Frederickson was guilty of

any negligence, it was the negligence of a fellow-servant and not of a vice-principal. [76—61]

4. That upon the evidence introduced by plaintiff, it clearly establishes the fact that plaintiff, by his conduct at and immediately before the time of the accident, assumed the risk which resulted in the accident which caused the injuries complained of.

5. That it is clearly established by the evidence of the plaintiff that the accident which caused the injury complained of was brought about through the sole negligence of plaintiff and, therefore, he is guilty of contributory negligence which bars his recovery against the defendant in this action.

The COURT.—Motion denied. Exception allowed. [77—62]

DEFENSE.

Testimony of H. I. O'Neill, for Defendant.

H. I. O'NEILL, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. DONOHOE.

Q. State your name, age and residence?

A. H. I. O'Neill, 39 years, Cordova, Alaska.

Q. How long have you resided in Cordova?

A. Since 1908.

Q. What business are you engaged in?

A. Mercantile business.

Q. How long have you been engaged in the mercantile business? A. Since 1912.

Q. Are you acquainted with the plaintiff in this case? A. Yes, sir.

(Testimony of H. I. O'Neill.)

Q. Acquainted with the defendant in this action, one of the stockholders? A. Yes, sir.

Q. How long has Blum-O'Neill Company been doing business? A. Since 1915.

Q. And you have been connected with them all that time? A. Yes, sir.

Q. What position, if any, do you occupy with the defendant company, Blum-O'Neill Company?

A. Vice-president and manager.

Q. Are you the general manager of its business?

A. Yes, sir.

Q. Does it conduct business at any other place than Cordova? A. No, sir. [78—63]

Q. Did Blum-O'Neill Company ever conduct a store in Chitina or McCarthy?

A. Never did outside Cordova, no, sir.

Q. What are your duties as general manager of the company?

A. Well, handling most of the things pertaining to the business.

Q. General supervision? A. Yes, sir.

Q. And how long have you held that position?

A. Since we incorporated in 1915.

Q. Are you acquainted with Fred Frederickson?

A. Yes, sir.

Q. What position does Frederickson occupy in that company?

A. He is warehouse man, we call him.

Q. Where do you conduct your mercantile business?

A. On First Street in the corner of C in Cordova.

(Testimony of H. I. O'Neill.)

Q. Will you point it out on the chart there?

A. Yes, sir.

Q. Is it marked anything?

A. Blum-O'Neill Company's store.

Q. Where is your warehouse, if you have any?

A. Up here on Second Avenue and B.

Q. Where was the entrance to this warehouse?

A. Right here on the alley, half way between First and Second Streets on B Avenue.

Q. Is that in the basement of the building?

A. Yes, sir.

Q. Is it the basement of the building you formerly occupied, that place? A. Yes, sir.

Q. How long had you occupied that building previous to the fourth day of May?

A. Since we incorporated in 1915. [79—64]

Q. Now what were the duties of Fred Frederickson as warehouseman from October, 1921, up to May 4, 1922?

A. He checked the freight in as hauled by the transfer company and checked the orders as they were shipped out on the line; took care of the building, fires and furnace; looked after it in a general way; saw that the temperature was right for the goods and put up the orders given him to fill.

Q. Where would he get these orders?

A. For up the line they were written in our office and given to him.

Q. In the office down at the store? A. Yes, sir.

Q. How else would he get orders for any other things?

(Testimony of H. I. O'Neill.)

A. People would come in like the lady testified here, would come in and order something, some little thing; or the boys would send an order from the store for shorts to put up.

Q. What would these sales average a day, approximately, that Frederickson would make?

A. When we changed there in 1921 some days it would not run three or four or five dollars; possibly some restaurant order he would take in—that would naturally bring the sales up a little more.

Q. What would they average?

A. I don't suppose they would average more than, I couldn't say, probably ten or fifteen dollars a day.

Q. What became of the sale slips and money realized?

A. As far as the money was concerned, there was very little money taken in. Our instructions were not to make a retail establishment out of that place, but rather than to send a person out of the place he would sell a dozen eggs or a couple of pounds of bacon. [80—65]

Q. And he supplied some of the restaurants direct from the warehouse? A. Yes, sir.

Q. And what would become of the charge slips he would take in?

A. He had a book for that purpose, taken care of the same as the rest, and gathered up each night by a young lady.

Q. Were they gathered up the same as the slips down at the store were gathered up?

A. Every night, yes, sir.

(Testimony of H. I. O'Neill.)

Q. Did you frequent the warehouse very often in your capacity as general manager?

A. Every day. Sometimes two or three times a day.

Q. What did you do there?

A. What brought me always up there the first thing in the morning as a rule I would drop in there on my way to work. Then I would go through the sales slips and if I found any errors I would drop up there again to call his attention to any errors he might have made, or to tell him to discontinue the credit of some individual, something like that, which brought me up there about 10:20 every day.

Q. From the store to your residence you passed by the warehouse? A. Yes, sir.

Q. Now, under whose command and control and general direction was Fred Frederickson?

A. Under mine.

Q. Did he have authority to open any credit accounts? A. No, sir.

Mr. RAY.—Just one question: What was the authority of Frederickson?

The WITNESS.—Frederickson had no personal authority of his own.

Q. What would he do when any question would arise, come up.

A. He either called me on the phone, or let the matter drop until I went up there. [81—66]

Q. From October, 1921, to and including May 4, 1922, did Frederickson have any other authority,

(Testimony of H. I. O'Neill.)

such as control over employees or hiring employees? A. Absolutely not.

Q. Did Frederickson at any time during the period last mentioned ever employ or discharge any employee? A. He did not.

Q. Who did employ the men engaged in your mercantile business? A. I did.

Q. During the period from October, 1921, up to and including the 4th day of May, 1922, what was your average force of men?

A. From eight to ten.

Q. That included the bookkeeper?

A. That included the two young ladies in the office.

Q. How many men were employed in the warehouse during that period? A. One.

Q. Who was that? A. Fred Frederickson.

Q. You are acquainted with Mr. Sullivan?

A. Yes, sir.

Q. How long have you known Mr. Sullivan?

A. I must have known him since about 1912.

Q. Had he worked for you from time to time?

A. Yes, he worked for us a couple of different times.

Q. Do you remember him going to work for you in the fall of 1921, October or about then?

A. Yes, I hired him about that time, along about then.

Q. Was there a short interval of interruption in his work between October, 1921, and the fourth day of May, 1922? A. There was. [82—67]

(Testimony of H. I. O'Neill.)

Q. What was the cause of that?

A. For drunkenness—I laid him off.

Q. Who laid him off? A. I did.

Q. When did you put him on again?

A. Four days afterwards.

Q. Who rehired him? A. I did.

Q. What were Sullivan's duties from October, 1921, up to and including the fourth of May, 1922?

A. The delivery of groceries and the other articles that might be given him, such as furniture and clothing.

Q. Where was it Sullivan's duty to report the first thing in the morning?

A. After we had changed the putting up of orders up above he reported at the main store.

Q. When was that change made?

A. I think it was made about February or March, 1921.

Q. That was previous to Sullivan's re-employment? A. Yes, sir.

Q. The change had been made previous to that?

A. Yes, sir.

Q. Please explain this change from up above. What did you mean by this change from up above?

Mr. RAY.—Now, this is all before Sullivan even went to work on the employment on which he was injured.

Mr. DONOHOE.—I'll withdraw the question.

Q. Just state when and where it was Sullivan's duty to report in the morning after you employed

(Testimony of H. I. O'Neill.)

him in October, 1921. Where did he first report in the morning?

A. He reported at the store on First Street. [83—68]

Q. What were his duties after reporting there? What was he supposed to do there?

A. He was given, as a rule, a short list of items to get from the warehouse, made out by Mr. Anderson and a couple of ladies working there; to go up to the warehouse and get them and bring them down to the main store, to get the stuff in stock for the day.

Q. Just explain how you carry these stocks in the warehouse and what is meant by "shorts."

A. The store is of such nature that we didn't have room for bulky articles in the store so it was kept in the warehouse and each morning the boys made out a "short" list and Sully went up to the warehouse and got a couple of cases of milk, or a box of something, to fill up the shelves so we would have plenty of goods to take care of the small retail orders of the day.

Q. If an order would come into the store during the day for say very small articles and then a sack of sugar and a sack of flour and a case of milk, how would that be handled?

A. If an order called for ten pounds of sugar and a sack of spuds and some other bulky things not carried in large quantities at the store, the repacks, as we call them, would be put up in the main store and the heavy items would be phoned up to Fred

(Testimony of H. I. O'Neill.)

Frederickson by the man who put up the order, and ask him to put so and so's name on the items and set them at the door, or there would be a list attached to the rest of the merchandise so that he could go to the warehouse and pick up the rest of the stuff short on the order as we never carried any such large stuff in the main store. [84—69]

Q. All your bulky orders such as sacks and cases were filled from the warehouse? A. Yes, sir.

Q. Do you know of the Carlisle Packing Company order filled on May 4, 1922? A. I do.

Q. How did that order come in?

Mr. RAY.—We object to the question. If they have any records let us see them. Where is the record of it?

The WITNESS.—We have a record of it. I mailed it over to you, Mr. Donohoe.

Q. What did you mean by a record?

A. I mean the original order taken by the clerk in the store for this particular order that the accident happened with.

Q. What were Sullivan's duties in relation to delivering orders from either the store or warehouse?

A. He would come into the store and go back to his delivery counter and pick up such items as already put up for him there, and if there was an order to go to the city dock Mr. Anderson would—

Mr. RAY.—Now, your Honor, we object to all this. Let us get down to the accident. We submit it is an awful waste of time. It is irrelevant.

The COURT.—I fail to see its relevancy but he

(Testimony of H. I. O'Neill.)

may answer. Objection overruled. Exception allowed.

Mr. DONOHOE.—Proceed.

A. Tell him to take it.

Q. And was Sullivan subject to anybody's orders in regard to delivering goods from either the warehouse or store? A. Yes, sir.

Q. Whose orders was he?

A. He was subject to Mr. Anderson's orders at the store. [85—70]

Q. And whose orders at the warehouse?

A. Mr. Frederickson's, if any.

Q. Did Mr. Sullivan have any difficulty with Bud Anderson in the store about deliveries at one time during this recent employment? A. He did.

Q. Just state the circumstances of that and what you instructed him?

Mr. RAY.—I don't know the relevancy of this. I object on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Mr. O'Neill has testified that when he took orders from the main store they were from Mr. Anderson. I think the objection will have to be sustained. Exception allowed.

Q. Did you have a conversation with Sullivan on the third day of May, 1922, in regard to the method of delivering things from the store by wagon or sled? A. I did.

Q. Just state what occurred?

A. I came in the store about half past eight in the morning of the third and noticed Sullivan had the

(Testimony of H. I. O'Neill.)

double-enders still out. The words I said were "Sully, when the devil are you going to hook up the wagon instead of pulling the guts out of this horse." He told me he had the wagon down to Pat O'Toole's and he would be fixed up in a day or two and I said, "That's the trouble with you, you always leave it to the last moment."

Q. In compliance with that request, did Sullivan produce the horse and wagon?

A. He had the horse and wagon on the job the next morning.

Q. When did you first see him on the fourth day of May?

A. I saw him passing the door with some stuff on the wagon for the Carlisle Packing Company. [86—71]

Q. Just step down here and see this order?

A. It is the order that is supposed to have the butter and eggs on.

Q. I hand you a paper marked Defendant's Exhibit "I," and ask you what those two pages are; what is it?

A. It is an order for groceries from the Carlisle Packing Company to be delivered to their cannery.

Q. What date is it? A. May 4, 1922.

Q. Whose handwriting is that?

A. Bud Anderson's.

Q. Where did Bud Anderson work at that time?

A. In the store on First Street.

Q. Do you know how that order was sent up to the warehouse?

(Testimony of H. I. O'Neill.)

A. It had to be sent up by a messenger. That is the only way it could get up there.

Mr. DONOHOE.—We offer it in evidence as Defendant's Exh. "I."

Mr. RAY.—No objection.

The COURT.—It will be admitted as Defendant's Exhibit "I."

Q. What were the conditions of the streets of Cordova as to snow on the fourth day of May, 1922?

A. First Street was practically bare of snow and there was very little snow on Second Street, and there was absolutely no snow on the street between the warehouse and Second Street. This street from the warehouse door (indicating on map) which is the upper end of this place was absolutely bare of snow and down along this street is very little snow. There was considerable snow down here for the reason it was shovelled off from the buildings. There is always a lot of snow shovelled into this street every year, but down here there is practically no snow. This street was absolutely bare [87—72] and there was very little snow. There was some snow up in here.

Q. What is the relative grade between C Street and B Street?

A. The relative grade: It is a very slight grade here on C Street, almost level.

Q. What is the grade on B Street from the warehouse down to First Street?

A. It is about thirteen per cent.

(Testimony of H. I. O'Neill.)

Q. And what is it from the warehouse up to Second Street? A. About ten per cent.

Q. Do these items appearing on Defendant's Exhibit "I" represent the order of goods delivered by the Blum-O'Neill Company to the Carlisle Packing Company on May fourth and in delivering which the plaintiff was engaged at the time of the accident? A. They do.

Q. Were there any of those items delivered directly from the wharf to the Carlisle Packing Company, or where were they delivered from?

A. With the exception of the twenty cases of milk, it was from the warehouse.

Q. Were there some eggs?

A. There were come cases of eggs, I believe ten cases of eggs.

Q. And how many were delivered from the warehouse that morning? A. The whole ten cases.

Q. What became of the milk? Where did those twenty cases of milk come from?

A. It was delivered by Mr. Sullivan from the dock to the Carlisle Packing Company.

Q. You got a consignment on a ship and just transferred it. It never came up town at all?

A. That's it. You have Mr. Sullivan's signature there where he signed for it. [88—73]

Q. It never came up town at all? A. No, sir.

Q. Who in your organization had the control and supervision of your delivery outfit; horses, wagons and automobiles? A. I did.

(Testimony of H. I. O'Neill.)

Q. Did any of the employees have any supervision or control over that branch of your business?

A. No, sir.

Q. And who is the person that actually looked after it?

A. The delivery man looked after the horses, wagons—kept them in shape.

Q. Did Fred Frederickson have any authority whatever over your horses and wagons and things you used for delivery of goods? A. No, sir.

Q. Did he ever have any authority to direct Sullivan in relation to the horses and wagons?

A. He never did it.

Q. He never had such authority? A. No, sir.

Q. You heard Mr. Sullivan testifying that Frederickson ordered him to change from the sled to the wagon on the third day of May?

A. I heard him say that.

Q. Did Frederickson have any authority to make such order?

A. He certainly did not and Sully knows it.

Q. Just state what authority, if any, Frederickson had over Sullivan, the plaintiff in this action?

A. I would not call it authority at all. He would come in for an order and Fred would say, "Here's an order for Mrs. Satterlee or something for the model"; that is all. [89—74]

Q. Where were you at the time of the accident?

A. In the main store.

Q. How soon did you learn of the accident?

(Testimony of H. I. O'Neill.)

A. I got to the hospital just about the time Sully got there. I went right up to the hospital.

Q. Mr. O'Neill, are you acquainted with Dudley G. Allen? A. Yes, sir.

Q. When this case was set for trial did you make an effort to locate him and have him here as a witness? A. I did.

Q. And where did you ascertain where he was?

Mr. RAY.—We object to that; there is a stipulation here. We object to that.

Mr. DONOHOE.—I want to explain how we came to enter into a rather odd stipulation by telegraph.

The COURT.—I don't think it is necessary.

A. I located him in Portland.

Q. And do you know of afterwards wiring him several questions to be answered, on stipulation with attorneys for the plaintiff? A. I did.

Mr. RAY.—We object to that.

Mr. DONOHOE.—I want to prove that they were telegraphed.

The COURT.—I suppose your stipulation covers most of the questions and answers.

Mr. DONOHOE (to Mr. FOSTER).—Do you admit that the Blum-O'Neill Company is a corporation duly organized in the Territory of Alaska; has paid its license tax and so forth?

Mr. FOSTER.—Yes, we admit all that.

The COURT.—Let the record show that the plaintiff admits that the defendant is a duly organized corporation and has paid its license fee. [90—75]

(Testimony of H. I. O'Neill.)

Cross-examination by Mr. RAY.

Q. In making up your returns with reference to a payment of licenses to the clerk of this court for engaging in a general mercantile business, do you include the business transacted in your warehouse?

A. Yes, it is all one business.

Q. And you sell goods there at retail?

A. No, sir; not using it at all now.

Q. Now, you mean this present day?

A. Yes, sir.

Q. How about May 4, 1922?

A. If some customer like Mrs. Satterlee happened to drop in there for something she got it.

Q. You say you have no license for the warehouse as distinguished from your other business?

A. No, sir.

Q. You say Sullivan would report at the store every morning? A. Yes, sir.

Q. You had how many employees?

A. Eight or ten.

Q. And two bookkeepers to take care of the volume of business transacted?

A. One bookkeeper and filing clerk.

Q. And you did a general wholesale and retail business?

A. We are no wholesale store, just retail. We are not recognized as wholesalers.

Q. This Mr. Dudley Allen, is he a broker known as a travelling salesman? A. Yes, sir.

Q. And makes Alaska a part of his territory?

(Testimony of H. I. O'Neill.)

A. Yes, sir.

Q. And gets orders from you and Brown and Hawkins?

A. He don't get any orders from us. [91—76]

Q. Does he represent the National Grocery Company? A. No, sir.

Q. Did you ever buy a dollar's worth of goods from Dudley Allen? A. No, sir.

Q. Ever buy any True Blue Biscuits from him?

A. No, sir. There was some eggs we got and couldn't use.

Q. Just those eggs? A. Yes, sir.

Q. And will you say whether he depends entirely upon the amount of sales he makes for his compensation. Does he work on a commission basis?

A. I understand he does.

Q. You didn't witness this accident?

A. No, sir.

Q. You disclaim liability for any injury this man has suffered on the ground that a man working with him caused the injury, or that he assumed the risk of his employment. That is possibly a question of law and fact, not fair. You paid Sullivan $150 a month? A. Yes, sir.

Q. And have paid him nothing since the accident?

A. I paid him for the last month he didn't work.

Q. That would be the month of May?

A. Yes, sir.

Q. Sullivan had been connected with the outfit,

(Testimony of H. I. O'Neill.)

Blum-O'Neill and S. Blum & Co., off and on for six years had he not?

Mr. DONOHOE.—We object to that question.

Mr. RAY.—Well, had Sullivan been working for the Blum family—

Mr. DONOHOE.—We object to the question put in that way.

The COURT.—Objection sustained. Exception allowed. [92—77]

Q. Is Mr. Meyer Blum connected with the company at Cordova? A. He is.

Q. And was he on May 4, 1922? A. Yes, sir.

Q. You say no person other than yourself gave any orders or directions to Sully?

A. Outside of in the manner that I stated a while ago.

Q. Not to confuse you with grocery orders: there were no directions given with any authority of yours to Sullivan by any other employee?

A. Yes, sir, that's right.

Q. And if Frederickson said to Sully, "Take this load down to the Carlisle Packing Company," he did so without any authority from you?

A. Yes, sir.

That is all.

(By Mr. DONOHOE.)

Q. Did you understand the last question of Mr. Ray's? A. I think so.

The question repeated.

The WITNESS.—Frederickson had the right to

(Testimony of H. I. O'Neill.)

tell him to take it down to the Carlisle Packing Company.

Q. If either at the store or warehouse there was a bill of goods to be delivered to somebody, Anderson at the store or Frederickson at the warehouse had the right to tell him to deliver those things?

A. Yes, sir.

Q. That is as far as any direction went?

A. Yes, sir. [93—78]

Q. I don't know whether I asked you before or not, did Frederickson have any authority or control over your horses and wagons and delivery outfit?

A. No, sir.

That is all.

Mr. DONOHOE.—I wish to ask Mr. O'Neill a few additional questions.

Q. Does the Blum-O'Neill Company still own the wagon Sully was driving when he met with this accident? A. Yes, sir.

Q. Have you recently made measurements of the wagon bed? A. Yes, sir.

Q. Will you state the dimensions of that wagon bed?

A. Behind the seat of the wagon, 62 inches long.

Q. And how wide? A. Thirty-nine inches.

Q. What is the width of the seat?

A. Fifteen inches.

Q. What is the space in the wagon bed between the seat and the footboard? A. Four inches.

Q. What is the width of the footboard?

A. Nine inches.

(Testimony of H. I. O'Neill.)

Q. You heard Mr. Sullivan's testimony this morning that Mr. Frederickson had piled or assisted in piling four cases of milk and three cases of butter upon the seat and footboard. Is that possible to have been done? A. Impossible.

Mr. RAY.—Object to that.

The COURT.—He can testify to his opinion. Objection overruled. Exception allowed.

Q. What are the dimensions of a case of milk?

A. Nine and a half deep, thirteen by twenty long. [94—79]

Q. What are the dimensions of a case of butter?

A. Eight inches deep and, well I can't say positively, sixteen by twenty long.

Q. When you stated in answer to my previous question, it would be impossible, did you mean any possibility of it riding there with the wagon in motion?

A. It couldn't stay if the wagon was in motion.

Q. Mr. Sullivan testified that this additional stuff he speaks of was to go to the store to be kept there to fill short orders. What is your custom as to having three cases of butter at the store at the same time? A. We never had that much.

Q. And the milk?

A. We would have two or three cases of milk.

Q. How much does a case of butter weigh?

A. Sixty pounds.

Q. And a case of milk? A. Sixty-five pounds.

(Testimony of Fred Frederickson.)

Q. What kind of wood is the wagon made of?

A. I couldn't say.

That is all.

Witness excused. [95—80]

Testimony of Fred Frederickson, for Defendant.

FRED FREDERICKSON, called and sworn as a witness in behalf of the defendant, testified as follows:

Direct examination by Mr. DONOHOE.

Q. State your name and age?

A. Fred Frederickson, 33 years old.

Q. Where do you reside? A. Cordova.

Q. Are you acquainted with Mr. Sullivan?

A. I am.

Q. How long have you been acquainted with him? A. Since 1918.

Q. Are you acquainted with Mr. Harry O'Neill?

A. Yes, sir, I am.

Q. How long have you been acquainted with him?

A. Since 1917.

Q. And you are acquainted with the corporation, Blum-O'Neill Company? A. I am.

Q. Were you employed in Cordova by the Blum-O'Neill Company from October, 1921, to and including the fourth day of May, 1922? A. I was.

Q. In what capacity? A. As warehouseman.

Q. Who employed you? A. Mr. O'Neill.

Q. Where did you draw your salary?

A. From the Blum-O'Neill Company.

Q. What part of it?

(Testimony of Fred Frederickson.)

A. At the office in the general store. [96—81]

Q. Is there a telephone communication between the office, general store and warehouse?

A. There was telephone communications, yes, sir.

Q. Do you know in what service the plaintiff was engaged in while working for the Blum-O'Neill Company between October, 1921, and the fourth day of May, 1922? A. As a deliveryman.

Q. What were your duties as warehouseman?

A. To check the incoming and outgoing freight; to keep the house clean and orderly; keep the stuff in piles, segregate it. Also put up the rail freight, the packing; kept the fires going.

Q. Under whose supervision were you?

A. Mr. O'Neill's.

Q. Did Mr. O'Neill visit the warehouse often?

A. Every day.

Q. What did you know Mr. O'Neill to be in this organization? A. Manager.

Q. And you say he visited the warehouse every day? A. He did.

Q. For what purpose?

A. To give me instructions.

Q. And you conducted the warehouse under his instructions?

A. To the best of my ability, yes, sir.

Q. When you were in doubt on any question or method of doing your business what did you do, if anything? A. Called him up.

Q. Who? A. Mr. O'Neill.

Q. How did you call him up?

(Testimony of Fred Frederickson.)

A. By telephone. [97—82]

Q. For what purpose?

A. To find what he wanted, what he wanted to do in the matter at hand.

Q. State some instances in which you would consult Mr. O'Neill?

Mr. RAY.—We object to the question. Incompetent, irrelevant and immaterial.

The COURT.—Objection overruled. Exception allowed.

A. If I was filling an order for the railroad; if I was in doubt as to what brand of goods was wanted to be put up, I would call him up and ask his advice.

Q. Were you authorized to sell small articles in the store?

A. In case somebody happened to drop in.

Q. Did you make some sales?

A. Once in a while.

Q. Was it your duty to go to the restaurants and get their orders daily?

A. I generally called on them, yes, sir.

Q. And you delivered that direct from the warehouse?

A. Yes, unless it had to go from the store.

Q. What would you do with the charge slips for goods like you delivered, for instance to the Model Restaurant?

A. I would put them in the back of the bill-book.

Q. Then what would become of them?

Mr. RAY.—We object to this as immaterial.

(Testimony of Fred Frederickson.)

The COURT.—Objection overruled. Exception allowed.

A. The bookkeeper would gather them up every day.

Q. Did you have any authority to direct Sullivan in the performance of his work other than to tell him when you had goods to go out?

A. No, sir, I generally called up the store in case I had something to deliver and couldn't deliver it myself. [98—83]

Q. And what would be the result of that?

A. They would send Sullivan up and he would come and take it.

Q. Mr. Sullivan, in his testimony this morning, if I remember rightly, seemed to state that he was directly under your supervision and control. Is that true? A. It is not.

Q. And he stated, I believe, that he reported to you practically for everything. Is that true?

A. No, sir.

Q. To what extent have you ever during the period between the month of October, 1921, and the fourth of May, 1922, ordered or directed Sullivan?

A. I never gave him any orders, except when he stepped in and I had something to deliver. He would take it. I would tell him about it.

Q. How were these orders filled in reference to your warehouse and in reference to the store where an order was turned into the store?

A. The repacks were filled at the store and de-

(Testimony of Fred Frederickson.)

livered from there. The heavies were picked up at the warehouse by Sullivan.

Q. What do you mean by the "heavies"?

A. Full cases, or sometimes half cases or sacks of flour or spuds.

Q. Full sacks? A. Yes, sir.

Q. Did you have any control or supervision over the delivery apparatus, the horses, wagons, automobiles?

Mr. RAY.—Object to the question—it's leading.

The COURT.—Objection overruled. Exception allowed. A. None. [99—84]

Q. Did you ever, at any time, direct Sullivan in connection with the horses and wagons or sleds and automobiles? A. I never did.

Q. You were in the courtroom this morning when Sullivan was on the stand? A. I was.

Q. You heard him testify that you had told him on the third day of May to hitch up the horse to the wagon the next day and abandon the sled. Did you give any such order? A. I did not.

Q. Did you have any conversation at all with him that evening? A. I did.

Q. Just state that conversation?

A. He said, "I think I will have the wagon out to-morrow," and I said, "Is that so?" He said, "Yes, Mr. O'Neill gave me instructions to get the wagon out."

Q. You and Sullivan were very good friends, were you not? A. Yes, sir.

(Testimony of Fred Frederickson.)

Q. And you continued to be very friendly with him until after this suit was brought? A. I did.

Q. Do you remember Sullivan coming to the warehouse on the morning of the fourth of May?

A. Yes, sir.

Q. Did he take a load of goods from the warehouse? A. Yes, sir.

Q. You said that the term "repacks" were put up at the store, C and First Streets, and the heavies were put up by you at the warehouse. How did you learn what heavies were to be put up?

A. On local orders you mean?

Q. Yes. [100—85]

A. They were either phoned up or a memorandum sent up.

Q. Who were those memorandums sent up by?

A. Whoever happened to come up.

Q. The deliveryman, did he bring any up?

A. Sometimes.

Q. And you would fill it up there?

A. Yes, sir.

Q. What time did Sullivan appear at the store on the fourth day of May? A. I don't know.

Q. I mean, appear at the warehouse?

A. At nine o'clock, or a little before.

Q. Did he take any goods from the warehouse to the Carlisle Packing Company? A. He did.

Q. Did he take a wagon load?

A. About that, I guess.

Q. Was there anything said about the remaining part when he loaded on the first load?

(Testimony of Fred Frederickson.)

A. Yes, he said he was coming back to get the rest of it.

Q. How did he go after he left the warehouse on the first trip? A. On leaving the warehouse?

Q. Yes.

A. He went down B to First, and then down to Carlisle.

Q. When did he return. How long after?

A. About an hour and a half or an hour and three-quarters.

Q. How did he come back?

A. He came down to the warehouse from Second Street.

Q. And he pleads in his complaint that you ordered him to back his wagon in. Was there anything done about that?

A. I didn't say anything about it at all. He backed in. [101—86]

Q. And you had the balance of the Carlisle outfit on a truck there? A. I did.

Q. Who loaded it on the wagon?

A. I helped Sully load it on.

Q. What did that load consist of?

A. Six cases of eggs.

Q. Just describe how those six cases of eggs were loaded?

A. There were three cases shoved up in front toward the dashboard and three cases behind them again, and then four boxes of toast; sack of split peas; sack of Jap rice, set on top of the rice.

(Testimony of Fred Frederickson.)

Q. The eggs extended back—how long is a case of eggs? A. Two feet four inches.

Q. And there were two cases, end to end?

A. Yes, sir.

Q. And it took up four feet, eight inches?

A. Yes, sir.

Q. Now, what was behind the eggs on the floor of the bed?

A. I don't remember exactly but I think that the tailboard—there was some toast sitting on the tailboard up against the eggs.

Q. And how big is a case of toast?

A. Cubic dimensions?

Q. No, dimensions, not cubic contents?

A. About one foot five by one foot six by one foot ten.

Q. That is one foot five in width, by one foot six in breadth and what is the length?

A. About one foot ten.

Q. Now you say there were some cases of toast piled on the eggs? A. Yes, sir.

Q. Were they in the front or behind the seat?

A. Behind the seat. [102—87]

Q. Was there any part of the load piled on the seat? A. No, sir.

Q. Any part piled on the dashboard or footboard?

A. No, sir.

Q. What would be the weight of those supplies you had put on the wagon?

A. Not more than 850 pounds. You understand

(Testimony of Fred Frederickson.)

the toast was big and bulky and might have looked more.

Q. Was there anybody else present there besides you and Sullivan when you were loading this wagon?

A. Yes, Dudley Allen.

Q. He's a salesman, is he? A. Yes, sir.

Q. And did he remain there all the time until you loaded the wagon? A. Yes, sir.

Q. What was said by you and Sully after the wagon was loaded?

A. There were several things said: I remember one thing in particular.

Q. In reference to the wagon or shipment of goods?

A. Yes, I said "Sully, if I were you I would drive up on Second Street."

Q. What did he answer?

A. "No," he said, "I think it is easy to go to First Street. It is only a little ways and it is down hill."

Q. What else did Sullivan say in your and Dudley Allen's presence in regard to taking any additional supplies, if anything?

A. He remarked that they asked him to bring down a case of milk when he came from the store.

Q. What did Sullivan do with reference to that, if anything?

A. He went and got a case of milk and put it on the wagon.

Q. Did you say anything about that case of milk?

A. I suggested that he had load enough and if

(Testimony of Fred Frederickson.)

they needed it bad they could come up and get it. [103—88]

Q. What did he say?

A. He said "One case more or less doesn't matter. I can take it."

Q. Well, did he take it?

A. Yes, he put it on the seat; on the left-hand side.

Q. Then what did he do, if anything?

A. He drove away.

Q. How did he get into the wagon?

A. He climbed up on the seat.

Q. On which end of the seat was he sitting?

A. On the right-hand side.

Q. Was there a brake on the wagon?

A. There was.

Q. Did Sullivan stop after he started from the door until he was run over? A. He did not.

Q. What was the condition of the street from the warehouse up to Second Street as to snow?

A. Absolutely bare.

Q. No snow at all? A. No, sir.

Q. You heard Sullivan's testimony that you called him to stop after he got away twenty feet. Is that true or false? A. It is false?

Q. Did you load on any additional supplies at all?

A. I did not, after we finished loading the load.

Q. And that load going to Carlisle had no milk or butter? A. It did not.

Q. And you say this last case—after you got through loading the Carlisle stuff that Sully said

(Testimony of Fred Frederickson.)

they wanted a case of milk down at the store and he would take it? A. Yes, sir.

Q. Whereabouts was this milk piled?

A. On the other side of the warehouse. [104—89]

Q. How wide is the warehouse? A. Fifty feet.

Q. I don't know whether I asked you this question, did you have or was it any part of your duties to look after the sleds and wagons and horses?

A. No, sir.

Q. Did you at any time exercise any authority over that branch of the business? A. No, sir.

Q. Did you, while up at the warehouse, at any time between October, 1921, and the fourth of May, 1922, ever hire or pay off any men that worked there at the warehouse? A. No, sir.

Q. You never did? A. No, sir.

Q. You never had any such authority?

A. No, sir.

Q. You heard Mr. Sullivan's testimony in which he stated that you had hired and paid off men on short jobs. Is that true or false? A. It is false.

Q. This load that Sullivan took on before he put on this case of milk. Was that a perfectly safe load? A. I would consider it so.

Q. Do you remember visiting Sullivan at the hospital a few days after he was hurt?

A. I do.

Q. You had a conversation with him?

A. I had several conversations with him.

Q. Did you visit him very frequently in the hospital? A. Yes, sir. [105—90]

(Testimony of Fred Frederickson.)

Q. And did Sullivan come around to the warehouse and chat with you? A. Yes, sir.

Q. Did he ever at any time claim to you that his accident was caused by your putting on any additional boxes on the wagon?

Mr. RAY.—We object to the question.

The COURT.—Objection overruled. Exception allowed.

A. No, sir.

Q. I will ask you this, that at the time you visited Sullivan in the hospital in Cordova a couple of days after the accident if you and he being present and no other persons if you had a conversation in substance as follows: "You said to Sullivan 'How did it happen, was it the horse's fault' and Sullivan said 'No, it was not the horse's fault, it was the street's fault.'" Did such a conversation and statement take place?

A. Yes, sir.

Q. Did you ever at any time instruct Sullivan how to load groceries on the wagon that was going out?

A. I never instructed him. I loaded him some times.

Q. Did you instruct him how to do it?

A. If I saw a better way than he was doing, I would probably suggest it.

Q. When there was considerable goods to go out you helped put them on? A. Yes, sir.

Q. And you did so with the Carlisle order this morning? A. Yes, sir.

(Testimony of Fred Frederickson.)

That is all. [106—91]

Cross-examination by Mr. RAY.

Q. When an order came up to the warehouse, before you said anything to Mr. Sullivan about it you would telephone to the store and ask their advice whether Mr. Sullivan should deliver that load or not? A. I don't quite understand you.

Q. Are you sure you didn't understand that question? I will repeat the question: Before you ever suggested, to use your language, to Mr. Sullivan that he take a load of groceries from the warehouse would you call up the store and ask advice about it?

A. If Mr. Sullivan was down there, yes.

Q. If Mr. Sullivan was at the warehouse before you permitted him to depart with a load of groceries, in carrying out an order, would you call up the store and ask whether he could take that order out?

A. No, Mr. Sullivan was the deliveryman and he would take out the orders that were ready to go.

Q. Did you ever telephone to the store and ask them whether Mr. Sullivan should take a load down to the Carlisle Packing Co.? A. Yes, sir.

Q. On May fourth?

A. Yes, sir, it was done on May 3d.

Q. Then you had the Carlisle order on May 3d.

A. Yes, sir.

Q. And did you say there is an order for the Carlisle Packing Company to be delivered to-morrow?

A. They sent him up from the store to take the order.

(Testimony of Fred Frederickson.)

Q. And you said nothing to Mr. Sullivan the evening before about this? A. No, sir. [107—92]

Q. And as far as you knew, he had no knowledge of the order until the next morning? A. No, sir.

Q. So you didn't say on May third, after you had knowledge of this Carlisle order that you had better put on wheels to-morrow; you have an order to take to the Carlisle Packing Co.?

A. I never said that?

Q. He had a pretty good load?

A. He had some, yes.

Q. You said he had load enough and it would be better for him to go up the hill to Second Street?

A. Yes, sir.

Q. And you made that suggestion? A. Yes, sir.

Q. At the time you went to the hospital Sully was lying on his back? A. Yes, sir.

Q. And you were friendly with Sullivan?

A. Always was.

Q. You didn't go to the hospital for the express purpose of getting something which you could testify to? A. No, sir.

Q. You are still in the employ of the corporation?

A. Yes, sir.

Q. A stockholder? A. I have a few shares.

Q. How long were you warehouseman?

A. Since February, 1919.

Q. Have you kept a stock account, inventory account?

A. We took inventory once a year. [108—93]

(Testimony of Fred Frederickson.)

Q. Did you keep a stock account of what goods you had in the inventory?

A. I checked it in and checked it out.

Q. Where would that report go, to the main office? A. Yes, sir.

Q. You heard Mrs. Satterlee say something about purchasing some articles at the warehouse?

A. Yes, sir.

Q. Was there any license there?

A. We didn't conduct a retail store.

Q. What was done with the money?

A. It went to the company.

Q. And you made no account of the money as warehouseman, but did account as salesman?

A. As warehouseman.

Q. You were working as a salesman?

A. I am not a salesman.

Q. You were in charge of the warehouse, selling goods. You were the salesman?

A. A salesman is a man who travels and sells things.

Q. Don't you have salesmen in the store?

A. Yes, sir.

Q. And you were up there as a warehouseman?

A. Yes, sir.

Q. And not as a salesman? A. No, sir.

Q. You say that Dudley Allen was there. Was Mr. Allen there at the time you say Sully went back and got the case of cream? A. Yes, sir.

Q. There talking with you?

A. Yes, sir. [109—94]

(Testimony of Fred Frederickson.)

Q. And was he there all the time while the load was being put on? A. Yes, sir.

Q. You saw the accident? A. Yes, sir.

Q. Mr. Allen and yourself stood in the doorway?

A. Yes, sir.

Q. He wasn't half way up the block and saw Sully coming along and said "Hollo, Sully."

A. No, sir.

That is all.

The witness excused. [110—95]

Testimony of Harold Lund, for Defendant.

HAROLD LUND, called and sworn as a witness in behalf of defendant, testified as follows:

Direct Examination by Mr. DONOHOE.

Q. State your name and age?

A. Harold Lund, fifty-three.

Q. Where do you reside? A. Cordova.

Q. How long have you resided in Cordova?

A. Fifteen years.

Q. Are you acquainted with Florence Sullivan, the plaintiff in this action? A. I am.

Q. Where were you about eleven o'clock in the forenoon of May 4, 1922?

A. On the corner of First and B Streets.

Q. Were you standing on the sidewalk at that time? A. Yes, sir.

Q. Did you see the Blum-O'Neill delivery wagon with Mr. Sullivan in it coming down the hill?

A. Yes, sir.

Q. What first attracted your attention to it?

(Testimony of Harold Lund.)

A. Well, I saw the horse jump.

Q. Did you see Mr. Sullivan at that time?

A. I did.

Q. Where was he? A. On the seat.

Q. And shortly after that what happened?

A. Shortly after that I didn't see him. I stepped out into the center of the street and he was on the side of the wagon, outside the wagon, trying to get back on the wagon.

Q. How far was this from the cross-walk?

A. I don't know, it was between the warehouse and there. [111—96]

Q. What would you say it was, seventy or eighty feet?

A. I should judge it would be nearer sixty feet from the cross-walk to the warehouse.

Q. What was his position?

A. He was on the side of the wagon. He was working himself back and I thought he was going to make it. He finally got his foot on the front side of the wheel. He was getting on the seat again. I thought he was going to make it, but when he got down about to the cross-walk the wagon went into a snow cut that was right there at the cross-walk and he slid down off and the wheel went over his leg.

Q. When you first saw him he was working his way back up on the wagon? A. Yes, sir.

Q. What would you say, could he have let go of the wagon and been perfectly safe?

A. Yes, I think he could have let go of the wagon.

(Testimony of Harold Lund.)

Q. This was after he was entirely out of the wagon? A. Yes, sir.

Q. Are you a member of the city council?

A. Yes, sir.

Q. You are chairman of the street committee?

A. Yes, sir.

Q. Is it a portion of your duties to observe streets in Cordova? A. Yes, sir.

Q. What would you say as to the condition of B Street from First up to the alley at the door of the Blum-O'Neill warehouse?

A It was not in very good condition.

Q. What was on it?

A. There was considerable snow there. There are two buildings with flat roofs and they keep those shoveled off and then they cut a trail through that so that you can get through. [112—97]

Q. What would you say about it from the door of the Blum-O'Neill warehouse up to Second Street?

A. That was in good condition.

Q. Any snow on it?

A. If there was, very little.

Q. And along Second Street to C Street, what was that condition? A. Good.

Q. And C Street to First? A. Good.

Q. You had occasion to observe those streets?

A. I had men working all winter, more or less.

Q. What would you say whether driving the Blum-O'Neill wagon up the hill to Second Street as to whether that would be a safer or more dangerous way than driving down the hill to First Street?

(Testimony of Harold Lund.)

Mr. RAY.—Object to the question. Calls for a conclusion of the witness.

The COURT.—Objection sustained. Exception allowed.

Q. What would you say from your observation, Mr. Lund, whether it was safe to drive a wagon such as the Blum-O'Neill wagon down from the Blum warehouse to First Street on the fourth day of May, 1922?

Mr. RAY.—Same objection.

The COURT.—Objection sustained. Exception allowed.

Q. What would you say as to the grade of B Street from the cross-walk on First Street up to the middle of the warehouse?

A. The city engineer gives me 12 7/8 per cent.

Q. And from the warehouse up to Second Street?

A. The city plans show the same but it is not. I should judge it is about ten per cent.

Q. That would make three per cent difference?

A. Yes, on the other half of the block. [113—98]

Q. After reaching Second Street and going down toward C Street and then to First Street, how is the grade as to being steep or otherwise?

Mr. RAY.—We object for the reason that this is incompetent, irrelevant and immaterial.

The COURT.—Objection overruled. Exception allowed.

A. The grade is about five per cent, a slight grade.

Q. It is an easy street?

(Testimony of Harold Lund.)

A. Yes, you can go up there with a load easier than the other place.

That is all.

Cross-examination by Mr. RAY.

Q. What is your business?

A. Carpenter and builder.

Q. Did you drive a horse around the streets of Cordova on the 4th day of May? Ever drive a horse around the streets of Cordova?

A. No, sir.

Q. Never acted as a deliveryman?

A. No, sir, never did any delivering.

Q. You say that when you first noticed Sully he was behind the wagon?

A. No, sir, he was sitting on the seat.

Q. Then what did you notice?

A. Why, he shifted from the right-hand side to the left-hand side and the wagon tipped and he went off.

Q. Any boxes fall off with him?

A. I didn't notice any boxes. The only box—when I picked him up there was one box laying there. [114—99]

Q. Where was that box?

A. On First Street across the walk.

Q. How far would that be from the warehouse door? A. One hundred and fourteen feet.

Q. Did you see a box hit the horse and cause him to jump?

A. I didn't see anything like that?

Q. What direction did Sully come off the wagon?

(Testimony of Harold Lund.)

A. The right-hand side.

Q. How close was he to the wagon?

A. He was in the cut. He was close.

Q. He was running alongside the wagon?

A. He had his hand alongside the wagon dragging himself up again.

Q. Was the horse making any more jumps?

A. No, he was shaking his head but he wasn't jumping.

Q. He had quite a load?

A. Looked like quite a load.

Q. You didn't notice any boxes on the footboard?

A. I didn't see any.

Q. Did you see Sully under the wheels?

A. Yes, I saw the both wheels on both sides go over him. The front wheel went over him and the last wheel went over him.

Q. You didn't see him rolled along like a log?

A. No.

Q. How high was the bank of snow?

A. It stood six or seven feet high for half a block.

Q. And how far would that bank extend?

A. It left a driveway of ten feet. The street is thirty feet. It left an open cut of snow about ten feet. [115—100]

Q. How high the snow?

A. Six or seven feet.

Q. You gave the distance from where you were standing and the warehouse?

A. Yes, 114 feet.

(Testimony of Harold Lund.)

Q. You haven't looked up the grades of the streets?

A. I have been street commissioner for two years and know the streets.

Q. You presumably do work for Blum-O'Neill as for others?

A. I get most of their work, but I don't get it all.

That is all.

Witness excused. [116—101]

Testimony of W. J. Kavanaugh, for Defendant.

W. J. KAVANAUGH, called and sworn as a witness in behalf of defendant, testified as follows:

Direct Examination by Mr. DONOHOE.

Q. State your name and age.

A. Thirty-four, W. J. Kavanaugh.

Q. Where do you reside? A. Cordova.

Q What is your business?

A. Work for the Alaska Transfer Company.

Q. How long have you been engaged with the Alaska Transfer Co.? A. About five years.

Q. What does the transfer company's business cover? A. General freighting, coal.

Q. Handle all the coal? A. Yes, sir.

Q. How many teams do they operate?

A. Four teams now.

Q. And you have been with the outfit for five years? A. Five years last January.

Q. Are you familiar with the streets of Cordova

(Testimony of W. J. Kavanaugh.)

as to grades and when the snow is on the ground as to snow? A. Yes, sir.

Q. Were you familiar with the condition of B Street between First and Second Streets on the fourth day of May, 1922? A. I was.

Q. You know of this accident occurring at the intersection of B and First Streets?

A. Yes, sir.

Q. Were you present shortly afterwards?

A. I was in front of our place. I saw the accident after he came down the hill. [117—102]

Q. Were you familiar with the condition of B Street from the warehouse of the Blum-O'Neill Co. up to Second Street? A. Yes, sir.

Q. What was that condition as to snow?

A. It was practically bare.

Q. Were you familiar with the condition from the warehouse down to the intersection of First Street? A. Yes, sir.

Q. What was the condition of that portion?

A. There was quite a lot of snow there on account of the snow being blown off the buildings.

Q. What would you say as being dangerous or not for travel with a wagon like the Blum-O'Neill delivery wagon?

Mr. RAY.—Object to the question. Calls for a conclusion.

The COURT.—Objection overruled. Exception allowed.

A. You mean dangerous to come down the hill?

Q. Yes.

(Testimony of W. J. Kavanaugh.)

A. I would say it was; yes, sir.

Q. You are familiar with horses pulling loads around the streets of Cordova? A. Yes, sir.

Q. You have had five years' experience in that?

A. Yes, sir.

Q. Are you acquainted with the horse hitched to the Blum-O'Neill wagon on the fourth day of May, 1922? A. Yes.

Q. What would you say of the ability of that horse to pull a load not exceeding one thousand pounds up B Street from the warehouse to Second Street and then down Second Street to C and down C to First?

Mr. RAY.—We object to the question. It's irrelevant. This man talking about the ability of a horse to pull a certain load up this or that street. [118—103]

The COURT.—Objection sustained. I think Mr. Kavanaugh has ample qualifications for the answer, but I think the question is wholly irrelevant to the issues. Exception allowed.

Mr. DONOHOE.—I am endeavoring to show that there were two routes which this man might have chosen and he deliberately chose the most dangerous one.

The COURT.—The objection is overruled. He may answer. Exception allowed.

A. I think he could do it very easily.

That is all.

Cross-examination by Mr. RAY.

Q. You are familiar with this wagon?

(Testimony of W. J. Kavanaugh.)

A. Yes, sir.

Q. How much does the wagon weigh?

A. We have done a lot of work on it. It is classed, I think, to hold a ton. It ought not to weigh—

Q. About a ton capacity?

A. I think it is classed for that.

Q. And a load of fifteen hundred pounds would be an ordinary load? A. Yes, sir.

Q. It would not be too heavy a load for the wagon? A. No, sir.

Q. And if you put five hundred pounds on that, on the seat and dashboard, what would you say then?

A. I would say the wagon was overloaded.

Q. This is a rather steep grade there?

A. Yes. [119—104]

Q. It is not a very safe grade even for a team of horses with a good brake. It is a thirteen per cent grade? A. Yes.

Q. Do you know the grade on Second Avenue?

A. It is a very small grade.

Q. You call five per cent a small grade?

A. Mr. Lund said it was that much. I didn't think it was.

Q. You say that between the warehouse and Second Avenue it was practically bare on May 4th?

A. Yes, sir.

Q. The only way you recall it is the accident occurred on that day. You couldn't tell me how

(Testimony of W. J. Kavanaugh.)

much snow was on the street the third day of April? A. No, but there was a whole lot of it.

Q. Your attention has been directed to this date?

A. I looked it up for my own benefit to see what day we got our wagons out?

Q. So you were on wheels also? A. Yes, sir.

Q. You didn't keep any record of this accident?

A. No, sir.

Q. And you had no diary as to the amount of snow. Was the snow honeycombed soft or hard?

A. I remember the day. It would naturally be hard.

Q About how wide a cut would that leave in the snow? A. Not over ten feet.

Q. And what would be the width of the wagon?

A. About five feet. Would not be quite that much. [120—105]

Q. And about how high was this snow piled on each side of the street?

A. I would say six or seven feet.

Q. Leaving an open cut through the snow?

A. Yes, sir.

Q. Had you driven up First Street with a wagon?

A. Yes, sir.

Q. And down it? A. Yes, we go both ways.

That is all.

Witness excused.

Mr. DONOHOE.—We now offer in evidence the deposition of Dudley G. Allen taken pursuant to stipulation.

(Testimony of W. J. Kavanaugh.)

Mr. RAY.—We will agree there is such a stipulation.

Mr. DIMOND.—We offer the stipulation with the deposition. May I read the stipulation?

The COURT.—You may.

STIPULATION.

It is hereby stipulated and agreed by and between the above-named parties, acting by and through their respective attorneys of record, that the hereinafter set forth interrogatories may be telegraphed to Dudley G. Allen at Portland, Oregon, and his answers to these questions shall be written out and sworn to by the said Dudley G. Allen before a notary public or other officer authorized to administer oaths in the city of Portland, State of Oregon, and when these answers are [121—106] so written out, signed by Allen and sworn to before the notary public, or other person authorized to administer oaths, and the party administering the oath shall sign the same and attach his seal of office, that said affidavit shall be immediately mailed to the clerk of the court at Valdez, Alaska, and when received by said clerk may be published and read in evidence at the trial of said cause with the same force and effect as a deposition taken according to law would have.

All formalities to the taking and transmitting of this deposition are hereby waived, save and except as hereinbefore stated.

The questions to be put to the said DUDLEY G. ALLEN are as follows:

One. State your name and age.

Two. What is your business.

Three. Do you know Florence J. Sullivan, the plaintiff in this action, and Fred Frederickson?

Four. Were you present at the warehouse of The Blum–O'Neill Company on B Street in the town of Cordova on the fourth day of May, nineteen hundred and twenty-two when the said Sullivan was loading a load of groceries on the delivery wagon of the Blum–O'Neill Company.

Five. Did you hear a conversation between Frederickson and Sullivan relating to the loading of said wagon particularly in regard to the last case of milk put upon said load.

Six. State what was said by Frederickson and what was said by Sullivan in this regard in this conversation.

Seven. What did Sullivan then do.

Dated at Cordova, Alaska, this 29th day of January, 1923.

(Signed) FRANK H. FOSTER,
Attorney for Plaintiff.

(Signed) DONOHOE & DIMOND,
Attorneys for Defendant.

Mr. DIMOND.—Pursuant to which stipulation the following deposition was taken. It is addressed to the clerk of the District Court, Valdez, Alaska. [122—107]

Deposition of Dudley G. Allen, for Defendant.

Question 1. What is your name and age?

Answer. Dudley G. Allen; age 39.

Question 2. What is your business?

Answer. Merchandise broker.

Question 3. Do you know Florence J. Sullivan, plaintiff in this action, and do you know Fred Frederickson?

Answer. Yes.

Question 4. Were you present at the warehouse of the Blum-O'Neill Company on B Street in the town of Cordova on the 4th day of May, 1922, when the said Sullivan was loading a load of groceries on the delivery wagon of the Blum-O'Neill Company?

Answer. Yes.

Question 5. Did you hear a conversation between Frederickson and Sullivan relating to the loading of said wagon, particularly in regard to the last case of milk put upon said load?

Answer. Yes.

Question 6. State what was said by Frederickson and what was said by Sullivan in this regard in said conversation.

Answer. After Frederickson had stated that that was all for that load, which Frederickson and Sullivan had jointly put in the wagon, Sullivan said that he had to take another case of milk down to the store. Then Frederickson told Sullivan that he thought he had enough on that load. Sullivan

(Deposition of Dudley G. Allen.)

then said that he did not believe another case would make any difference. [123—108]

Question 7. What did Sullivan then do?

Answer. Sullivan went back in the warehouse and brought out a case of milk which he put on the seat of the wagon and then got up on the wagon and drove down the hill.

The foregoing questions I have answered truthfully to the best of my knowledge and belief. I remember the circumstances quite clearly in that I was witness to the entire happening and I sign my name below in the presence of a notary public.

(Signed) DUDLEY G. ALLEN,
Juneau, Alaska.

Subscribed and sworn to before me this thirtieth day of January, 1923.

[Seal] (Signed) A. A. McCLELLAN,
Notary Public.

My commission expires May 23, 1925.

Mr. DIMOND.—That is all.

Defendant rests.

Testimony of Betty Satterlee, for Plaintiff (Recalled).

BETTY SATTERLEE, a witness heretofore sworn and examined in behalf of plaintiff, recalled and testified as follows:

(By Mr. FOSTER.)

Q. When you saw the wagon coming down the hill, as you have testified, did you see Sully trying to climb on the wagon? A. No, sir.

(Testimony of Betty Satterlee.)

Mr. DONOHOE.—We object to that as not proper rebuttal. The witness has already testified to that. It is not rebuttal.

The COURT.—Objection overruled. Exception allowed. [124—109]

Q. Did you see Mr. Lund pick Mr. Sullivan up?

A. I did not. I think I was the first one to Sully and I picked him up as best I could myself.

Q. Did you see Mr. Lund there?

A. There were a number of people came directly and some one suggested they get a stretcher and take him to the hospital, and I held him in my lap until some one brought a stretcher.

Mr. FOSTER.—That is all.

Cross-examination by Mr. DONOHOE.

Q. Are you well acquainted with Mr. Lund?

A. No, not very much acquainted with him.

Q. Did you know him by name and sight previous to that time? A. I can't say I did.

Q. You say you heard someone suggest to go and get a stretcher? A. Yes, sir.

Q. It might have been Mr. Lund?

A. Yes, sir. The first person I recognized was Fred Frederickson and I think Mr. Frederickson helped to put him on a stretcher.

Q. And Mr. Lund might have been there?

A. I don't think he was there.

Q. You don't think Mr. Lund was there and saw this accident?

A. I know he was not there and picked Sully up.

Whether he was there and saw the accident I don't know.

Mr. DONOHOE.—That is all.

Mr. FOSTER.—That is all.

Plaintiff rests. [125—110]

Mr. DONOHOE.—If the Court please, I would suggest that that map be put in evidence. It has been used in the trial as an illustration.

The COURT.—It is usual to do it.

Mr. FOSTER.—It can be put in.

The COURT.—The map is submitted and will be marked Plaintiff's Exhibit "B."

Motion for Directed Verdict.

Mr. DONOHOE.—We wish to make a motion and desire to argue that motion to some extent.

The defendant now moves this Court to instruct the jury to find a verdict for the defendant and against the plaintiff on the following grounds:

1. The complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant in this, that plaintiff in his said complaint has failed to plead facts sufficient if true, to make Fred Frederickson a vice-principal of the defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

2. The plaintiff has wholly failed to prove that said Fred Frederickson was a vice-principal of defendant or acted as vice-principal of defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

3. That it is clearly shown by the plaintiff's testimony that if said Fred Frederickson was guilty of any negligence it was the negligence of a fellow-servant and not that of the vice-principal of defendant. [126—111]

4. The evidence introduced by plaintiff clearly establishes the fact that plaintiff, by his conduct at and immediately before the time of the accident, assumed the risk which resulted in the accident which caused the injuries complained of.

5. That it is clearly established by the testimony of the plaintiff that the accident which caused the injuries complained of was brought about by the sole negligence of plaintiff and, therefore, he is guilty of contributory negligence which bars his right to recover in this action.

Motion for an instructed verdict was by the Court denied and defendant allowed an exception to the ruling.

WHEREUPON, counsel addressed the Court and jury, after which the Court read its instructions to the jury, as follows:

In the District Court for the Territory of Alaska,
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

Defendant.

Instructions of Court to Jury.

Gentlemen of the Jury:

Plaintiff sues to recover for damages for personal injuries suffered by him while in the employ of the defendant, alleging in his complaint that they are directly due to the negligence of the defendant corporation acting through its authorized agent.

Defendant answers denying any liability, alleging that plaintiff was injured solely through his own negligence, denying [127—112] that the corporation's agent was in any way responsible for the accident, and pleads further that if any act of the agent in question contributed to the injury he was the fellow-servant of plaintiff, for whose negligence the corporation would not be liable.

2.

Plaintiff having the affirmative of the issue it is incumbent upon him to prove, by a fair preponderance of the evidence, all the material allegations of his complaint. If he succeeds in doing this he will be entitled to a verdict for such sum as you may find will compensate him for any damages you may find were directly traceable to the injury complained of, not exceeding the amount named in his complaint. If plaintiff fails to sustain the allegations of his complaint by such preponderance of the evidence it will be your duty to return a verdict for the defendant.

3.

The general law governing the relations of employer and employee, or as more commonly stated,

of master and servant, is this: The master is bound to take reasonable care to provide for his servants a reasonably safe place or places to work, and to furnish them with reasonably suitable and safe tools with which to work. The servant assumes all the natural risks of his employment and if he is injured through the occurrence of a natural risk, without negligence on the part of the employer, he cannot recover since he assumed the risk when he entered the employment. When an unusual risk is encountered and a servant is injured the question then arises, through whose negligence the injury occurred.

Certain duties of the master are said to be nondelegable. By this is meant that such duties are personal to the master and [128—113] he cannot delegate them to a servant and then escape liability if the servant fails to perform or negligently performs the duty, on the ground that the negligent servant was a fellow-servant of the injured servant. In every jurisdiction in this country the rule is that if a duty is personal to the master the one to whom he entrusts the performance of this duty is called a vice-principal and the master is liable for his negligence in relation to such duties.

The meaning of this is that if the master entrust to an agent the performance of certain duties he cannot escape liability on the ground that the negligence was that of the agent and not of the master. This rule refers to the duties already stated, that of taking reasonable care to provide a reason-

ably safe place to work and to furnish reasonably safe and suitable tools and appliances. If the master, either by himself or through an agent, fails in any of these duties he is liable regardless of where the responsible negligence may lie, with one exception to be stated to you hereafter.

This rule as to nondelegable duties has given rise to what is known as the doctrine of vice-principal. A vice-principal is one who has general authority to represent the master in the direction of the master's work and who, because of such authority, is deemed by law to be vested with the nondelegable duties already described.

A vice-principal is one whom the master has clothed with power to act in his stead in the performance of a duty owing from the master to his servants, and for all his acts or omissions in respect of the matters in which he acts in the place of the master, in performing the master's duty, the master is [129—114] liable. Simply because one servant is superior in grade, rank, or authority does not make him any more the representative of the master than those lower in position. It is not grade or position that determines whether a servant is acting for and instead of the master, but the duty he is performing.

In every case the position of vice-principal must be determined by ascertaining whether the act performed or duty omitted is one the doing of which is charged by the master upon the servant; in other words, whether the servant has been put

in the place of the master as to the particular service performed or omitted.

The test whether in a given case an employee is to be regarded as a vice-principal or a fellow-servant is, not his title or rank or power to employ or discharge servants of the master, but the nature of the services which he performs. An employee, authorized to perform duties which are clearly the master's, is to that extent a vice-principal. In every case the controlling inquiry must be whether the act or omission resulting in injury involved the duty owing by the master to the injured servant.

4½.

The jury are instructed that a servant is as a general rule excusable for obeying orders in and about his master's business, when such orders are given by the master or by one in authority over the servant, as the representative of the master, unless the danger to be incurred by such obedience is so plain and manifest that no prudent person would attempt obedience, even under orders from one having authority over him, and although there be apparent danger in obeying the master's orders, yet such knowledge on the part of the servant will not, of itself, defeat a recovery, if the danger is not glaring and such as threatens immediate injury. [130—115]

5.

Fellow-servants are persons engaged in the same employment without any authority, one over another. A person entering into the employment

of another assumes the usual risks of the employment, excluding that of the negligence of the employer and including that of the negligence of his fellow-servants, whenever doing anything contemplated by his contract of employment.

If the jury find from the evidence that Frederickson had no authority to direct the plaintiff as to the manner in which he performed his work, then he was not a vice-principal but he and the plaintiff were fellow-servants and plaintiff cannot recover even though you should find that his injury was due in whole or in part to some negligent action of Frederickson. His right to recovery in this action is dependent upon his showing by fair preponderance of the evidence that he was subject to Frederickson's orders, and that Frederickson was responsible for the way in which the wagon was loaded, including the quantity of said load.

6.

You are instructed that it is not sufficient to entitle the plaintiff to recover in this case to show a negligent breach of duty on the part of defendant corporation or its responsible agent, but it devolves upon the plaintiff to show further that such breach of duty was the proximate or immediate cause of his injury. If the plaintiff in any important degree or way contributed to the accident he was guilty of what is known in law as contributory negligence. In such case the law disregards the negligence of the defendant and makes the negligence of the plaintiff a bar to his

recovery. You have already been instructed that a servant entering into employment assumes all the natural risks and hazards of the work. In this case if you [131—116] find that the accident was due to any unusual conditions you are to determine from all the evidence in the case whether or not plaintiff was so bound by the orders given him by Frederickson, if orders were given him, that he could not without disobeying orders so shape his conduct as to avoid the unusual risk. If he could have so acted in the emergency by the exercise of reasonable prudence and foresight such as may be expected of an ordinary man in a like situation, and failed to do so, he was guilty of contributory negligence and is not entitled to recover.

7.

As these definitions of the law are somewhat long I will sum them up into a brief statement, but you are not to take this brief statement alone but are to consider it in connection with the detailed instructions already given.

1. That plaintiff is entitled to recover if he has proven by a fair preponderance of the evidence that his injury was the result of an unusual risk which he assumed under the direct orders of a vice-principal of the defendant corporation, and that he was guilty of no contributory negligence which aided materially in producing the accident, that is, under the circumstances he acted as might be expected of an ordinarily prudent and careful man in his situation.

2. That plaintiff is not entitled to recover if you find: (a) that he was injured through an ordinary risk of the employment which risk he assumed when he entered the employment; (b) if he was injured through the act of a fellow-servant, that is the act of an employee who had no controlling authority over him in the circumstances; (c) if you find that his own negligence was an important contributing factor to the accident. [132—117]

8.

If you find that plaintiff is entitled to recover you will include in the amount of his recovery whatever reasonable sums he has paid for medical and hospital treatment; second, such sum as will compensate him for his loss of time from work; third, such sum as the jury may find he is entitled to receive for the mental and physical pain and suffering he has undergone as the result of his said injury. This latter sum is difficult of exact computation since pain and suffering can not be measured in money. The amount allowed is left to the sound discretion of the jury. The total amount must not exceed the amount asked in plaintiff's complaint, to wit, $6,358.

9.

The rule of law is that where there are two methods by which a service may be performed, one perilous and the other safe, an employee who voluntarily chooses the perilous method rather than the safe one cannot recover for an injury thereby sustained; and I instruct you that if you

find from the evidence that the plaintiff could have chosen a route of going up B Avenue to Second Street and along Second Street to C Avenue and down C Avenue to First Street, instead of going down the steep grade over the ice and snow on B Avenue to First Street, and if you further find that the route down B Avenue to First Street was more dangerous than the route up B Avenue to Second Street, and that the plaintiff voluntarily and under no compulsion chose the more dangerous route, then plaintiff was guilty of such negligence as to bar his right of recovery in this action and you must find for the defendant.

10.

I instruct you that a master is not responsible for the neglect of an employee or agent in the performance of the [133—118] duties which are in no sense part of the master's work. The master may leave the carrying out of the details of the work to one of his servants, and at the same time, be not responsible for negligence of such servant.

11.

By the law of Alaska the jury are made the exclusive judges of the facts; that is, the weight of the testimony and the credibility of the witnesses. All questions of law involved in the trial are to be decided by the Judge, and the law makes it your duty to accept as law what is laid down as such by the Court. Your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in accordance with the rules of evidence.

It is your duty to give to the testimony of each and all the witnesses such credit as you consider their testimony justly entitled to receive, and in doing so, you should not regard the remarks or expressions of counsel, unless the same are in conformity with the facts proven, or are reasonably deducible from such facts and the law as given to you in these instructions.

Jurors are not artificial beings, governed by artificial or fine spun rules; you should bring to the consideration of the evidence your every day common sense and judgment, as reasonable men; and those just and reasonable inferences and deductions which you, as men, would ordinarily draw from facts and circumstances proven in the case you should draw and act on as jurors

Evidence is to be estimated not only by its own intrinsic [134—119] weight, but also according to the testimony which it is within the power of one side to produce and the other side to contradict, and, therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distruct.

E. E. RITCHIE,
Judge.

Mr. RAY.—The defendant excepts to the instruction No. 9 just given by the Court with reference to the choice of routes which the plaintiff

might have taken as not applicable to this case, the instruction reading as follows:

> "The rule of law is that where there are two methods by which a service may be performed, one perilous and the other safe, an employee who voluntarily chooses the perilous method rather than the safe one cannot recover for an injury thereby sustained; and I instruct you that if you find from the evidence that the plaintiff could have chosen a route of going up B Avenue to Second Street and along Second Street to C Avenue and down C Avenue to First Street, instead of going down the steep grade over the ice and snow on B Avenue to First Street, and if you further find that the route down B Avenue to First Street was more dangerous than the route up B Avenue to Second Street, and that the plaintiff voluntarily and under no compulsion chose the more dangerous route, then plaintiff was guilty of such negligence as to bar his right of recovery in this action and you must find for the defendant."

Exception allowed.

Mr. DIMOND.—The defendant excepts to the second paragraph, not numbered, of the Court's instructions No. 5, reading as follows:

> "If the jury find from the evidence that Frederickson had no authority to direct the plaintiff as to the manner in which he performed his work, then he was not a vice-principal but he and the plaintiff were fellow-ser-

vants and plaintiff can not recover even though you should find that his injury was due in whole or in part to some negligent action of Frederickson. His right to recover in this action is dependent upon his showing by fair preponderance of the evidence that he was subject to Frederickson's orders, and that Frederickson was responsible for the way in which the wagon was loaded, including the quantity of the load." [135—120]

This exception is based on the defendant's theory of the case that Frederickson had no authority to act for the principal as to any nondelegable duties of the defendant and did not so act. And the evidence shows that any directions Frederickson may have given plaintiff were given as an operative concerning the details of the work.

Exception allowed.

Mr. DIMOND.—The defendant excepts to the Court's instruction No. 6 in its entirety as given by the Court on the ground, as stated in the exception to the former instruction, and that it assumes the defendant is bound by all orders of Frederickson where as the defendant views the law Frederickson in giving such orders was not performing any of the nondelegable duties of the defendant. The instruction reads as follows:

"You are instructed that it is not sufficient to entitle the plaintiff to recover in this case to show a negligent breach of duty on the part of defendant corporation or its responsible agent, but it devolves upon the plaintiff

to show further that such breach of duty was the proximate or immediate cause of his injury. If the plaintiff in any important degree or way contributed to the accident he was guilty of what is known in law as contributory negligence. In such case the law disregards the negligence of the defendant and makes the negligence of the plaintiff a bar to his recovery. You have already been instructed that a servant entering into employment assumes all the natural risks and hazards of the work. In this case if you find that the accident was due to any unusual conditions you are to determine from all the evidence in the case whether or not plaintiff was so bound by the orders given him by Frederickson, if orders were given him, that he could not without disobeying orders so shape his conduct as to avoid the unusual risk. If he could have so acted in the emergency by the exercise of reasonable prudence and foresight such as may be expected of an ordinary man in a like situation, and failed to do so, he was guilty of contributory negligence and is not entitled to recover."

Exception allowed.

Mr. DIMOND.—The defendant excepts to the first paragraph, No. 1 of the Court's instructions No. 7:

"1. That plaintiff is entitled to recover if he has proven by a fair preponderance of the evidence that his injury was the [136—121]

result of an unusual risk which he assumed under the direct orders of a vice-principal of the defendant corporation, and that he was guilty of no contributory negligence which aided materially in producing the accident, that is, under the circumstances he acted as might be expected of an ordinary prudent and careful man in his situation."

upon the ground last above stated, and that it assumes the plaintiff was bound to follow the orders of Frederickson and that his injury so resulting might be used as a basis of plaintiff's negligence against the defendant. Exception allowed.

The defendant also excepts to the Court's instructions subparagraph 2 (b) of the Court's instructions No. 7, reading as follows:

"That plaintiff is not entitled to recover if you find * * * (b) If he was injured through the act of a fellow-servant, that is the act of an employee who had no controlling authority over him in the circumstances."

Exception allowed.

Mr. DIMOND.—Defendant further excepts to the Court's instruction No. 8 in its entirety upon the ground that there is no substantial basis for it in the evidence, the instruction reading as follows:

"If you find that plaintiff is entitled to recover you will include in the amount of his recovery whatever reasonable sums he has paid for medical and hospital treatment; second, such sum as will compensate him for his loss

of time from work; third, such sum as the jury may find he is entitled to receive for the mental and physical pain and suffering he has undergone as the result of his said injury. This latter sum is difficult of exact computation since pain and suffering can not be measured in money. The amount allowed is left to the sound discretion of the jury. The total amount must not exceed the amount asked in plaintiff's complaint, to wit, $6358."

Exception allowed.

Mr. DIMOND.—The defendant further excepts to the Court's refusal to give its requested instruction No. 2, reading as follows:

"You are instructed that the plaintiff's own testimony shows that he remained on the wagon to which he has testified [137—122] at the time when the wagon was being loaded by the defendant's employee, Fred Frederickson, and when he had ample opportunity to remove himself to a place of safety. By so doing the plaintiff knowing, as he has pleaded, the condition of the streets of the town of Cordova, and particularly the condition of B Street in said town, assumed all of the risks incident to his remaining on said wagon and attempting to drive with it down said B Street, and the defendant is not liable for the injuries plaintiff thus suffered."

Mr. DIMOND.—The defendant excepts to the

Exception allowed.

refusal of the Court to give its requested instruction No. 4, reading as follows:

> "I instruct you that a servant assumes the ordinary risks of his employment and is bound to exercise his own skill and diligence to protect himself, and unless you find from the evidence that the plaintiff exercised due skill and diligence to protect himself in choosing the route down B Avenue over the snow and ice in preference to the route of B Avenue to Second Street then you must find for the defendant."

Exception allowed. [138—123]

I do hereby certify that I am the official court stenographer for the Third Judicial Division, Territory of Alaska; that as such I reported the proceedings had at the trial of the above-entitled cause, to wit, F. J. Sullivan vs. The Blum O'Neill Company, being cause No. C–246 of the records of the above-entitled vourt; that the above and foregoing is a full, true and correct transcript of the evidence introduced and the proceedings had at the trial of said cause.

Dated at Valdez, Alaska, this 5th day of May, 1923.

J. W. LENAHAN. [139]

Plaintiff's Exhibit "A."

2 negatives (films) of fracture (both bones) left leg—F. J. Sullivan, Anchorage, Ala.

SEED

X-RAY PLATE

Date Jan. 12, 23. No. .....

Case .....

Tube Used .....

Exposure .....

Distance from Tube .....

Referred by Doctor .....

Development .....

Name F. J. Sullivan .....

Address .....

Diagnosis .....

.....

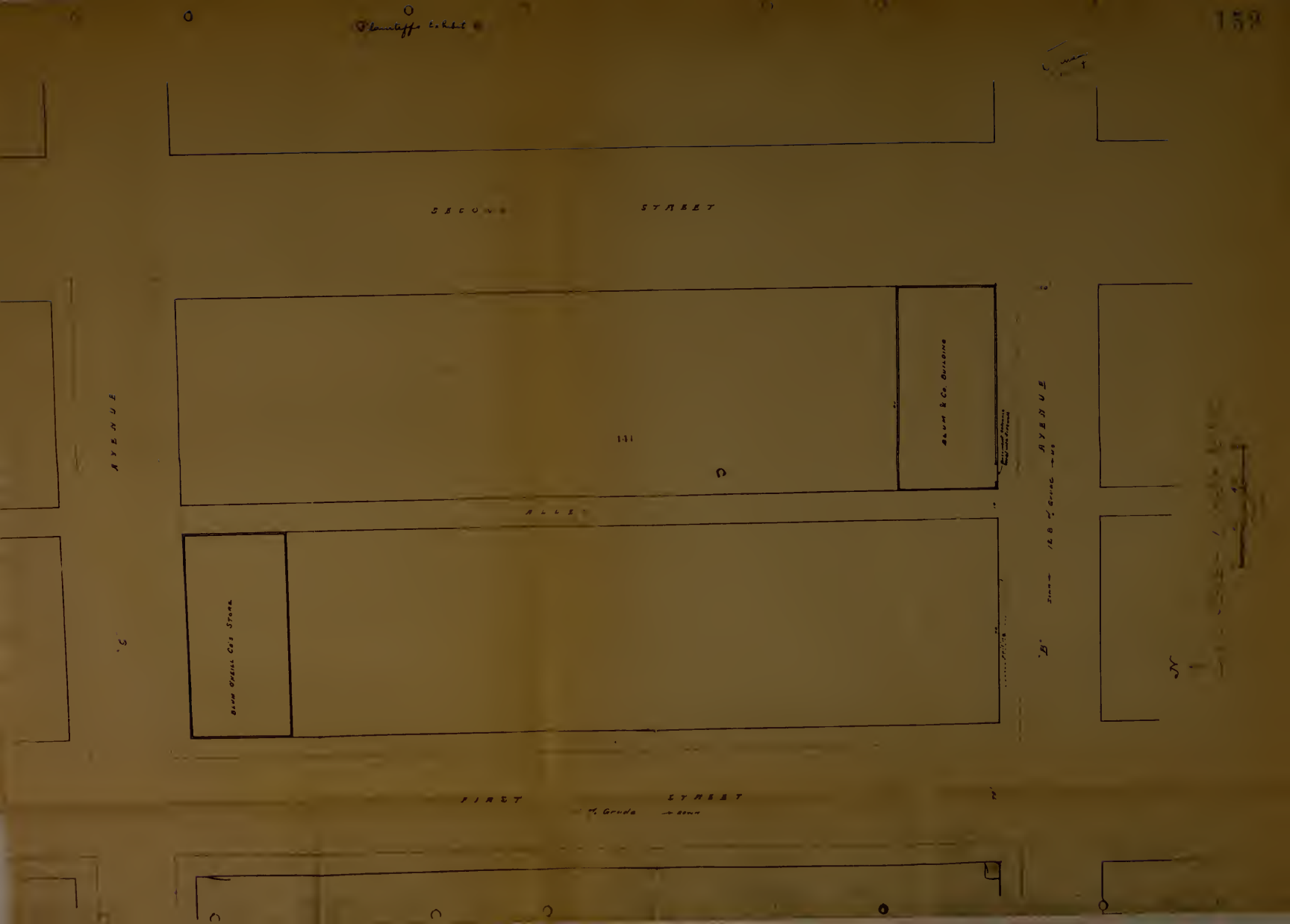
The sensitive side of the plate should be placed against the smooth side of the envelope.

This Outer Envelope can be the Container for Finished Negative

K P 6560

(Also containing certificate by Dr. J. B. Beeson concerning the two negatives contained herein and of the break in the leg of F. J. Sullivan.)

J. L. B. Jr. [140]


SECOND STREET
AVENUE
131
ALLEY
AVENUE
FIRST STREET

Defendant's Exhibit No. 1.

THE BLUM-O'NEILL COMPANY.

Sold to CARLISLE PAK. CO.

Cordova, Alaska, 5/4/22.

1156

		Checked 5-5-22.	Billed M-M	Posted Paid Price	Page 21971
	20 c/s Milk Fed Del from Dock			5.35	$107.00
195#	3 " Olg Rolled Oats Lge Pkgs			7.30	21.90
44#	2 Am Cheese		44	.30	13.20
25#	1 c/s S. Peas		2 Dz	4.35	8.70
82#	1 " Cream-O-wheat				9.50
300#	5 " Tom. D. M. 2½		10 Dz	2.60	26.00
38#	4 Cartons Snuff		36	.70	25.20
35#	1 c/s Velvet Tobacco		1 Gross 12 Oz	1.53	18.36
15#	1 " Sch Baking Powder		2 Doz 8 Oz	3.25	6.50
64#	2 " Lunch Tongue		4 Oz	5.35	21.40
	$477.47				$477.47

vs. F. J. Sullivan

161

THE BLUM-O'NEILL COMPANY.

Sold to CARLISLE PAK CO.

Cordova, Alaska, 5/4/22.

			Priced WGB	Checked M M	Billed 5-5-22
12#	4	Doz 2 Oz Cinnamon		1.60	6.40
100#	1	Sak Split Peas	100#	.09	9.00
165#	5	Oats None			
100#	4	Bxs. Sweet Toast Net Net	143#	.30	42.90
100#	2	" Ker Salt Mermaid		3.50	7.00
100#	1	Sk Rice Jap	100#		7.75
800#	10	Cs Eggs		11.00	110.00
30#	1	Bx Evp Apples	25	.22	5.50
	(500	Paper Bags 20s	½M	10.90	
70#	(500	" 12s	½M	6.95	
	(500	" 8s	½M	5.20	
			Less 40		13.80
78#	2	Rolls Paper 24 in.	78	.12	9.36
25#	200	Eggs Carton & Fillen		. 4	8.00
				Paid	219.41

[142]

In the District Court of the Territory of Alaska,
Third Division.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL CO., a Corporation,

Defendant.

Verdict.

We, the jury duly empanelled and sworn in the above cause, do hereby find for plaintiff and against the defendant in the sum of Twenty-two Hundred and Fifty Dollars—$2250.00.

WM. C. CUNNINGHAM,
Foreman.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 23, 1923. W. N. Cuddy, Clerk. By ————, Deputy.

Entered Court Journal No. 13, page No. 779. [143]

In the District Court for the Territory of Alaska,
Third Division.

No. C–246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

Defendant.

Motion for New Trial.

Comes now the above-named defendant and moves this Honorable Court for an order setting aside the verdict by the jury in this cause returned on the 22d day of February, 1923, and granting said defendant a new trial of said cause on the following ground:

First.—Insufficiency of the evidence to justify the verdict and that said verdict is against the law for the following reasons:

(a) That the complaint on which this action is based does not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant in that it fails to state facts, if true, which could make Frederickson a vice-principal of the defendant, while on the other hand the facts stated in the complaint do make Fred Fredrickson a fellow-servant of the plaintiff in his performance of the alleged acts contained in the complaint, and there is no evidence introduced sufficient to establish plaintiff's claim that Fred Fredrickson was at the time in question performing any of the nondelegable duties owing by the defendant [144] to plaintiff; while all of the evidence tends to establish that if Fredrickson was in any way whatever responsible for the accident which caused the injury that plaintiff complains of, he, Fredrickson in that matter was acting as a fellow-servant of plaintiff it being clearly established by the evidence that if Fredrickson did direct the plaintiff to load the wagon in the man-

ner described in plaintiff's testimony that this was not a nondelegable duty of the defendant but was simply one pertaining to the duties of an operative in carrying out the details of the work and which was an act of a fellow-servant and not of a vice-principal.

(b) Plaintiff has wholly failed by any sufficient evidence whatever to prove that the placing upon the wagon of the alleged additional four cases of milk and three cases of butter was the proximate cause of the accident which resulted in the injury complained of. The plaintiff's testimony on this subject is that the wheels of the wagon cut thru the snow and tilted the wagon over so that the cases and plaintiff fell off the wagon, showing clearly that the accident was caused by the wheels of the wagon cutting thru the soft snow rather than by the loading of the additional cases upon the wagon.

(c) The evidence of the plaintiff clearly established that the plaintiff assumed the risk of the accident which caused the injury complained of. Plaintiff testified when speaking of the statement made by Fredrickson to him wherein he objected to taking these additional cases, "I objected to taking them." He said (meaning Fredrickson) "I would have to take them," he said, "I would have to take them or quit—somebody else would." On cross-examination plaintiff testified that he protested to Fredrickson against putting on the extra stuff. "I told him the wagon was loaded and no more could get on." He said, "Put them

on the footboard." [145] "He placed them on the footboard and I put the four cases of milk on the seat." This clearly establishes that the plaintiff realized the risk he was assuming and had ample opportunity to get off the wagon if he did not care to assume the risk and that he did voluntarily assumed any risk in connection with driving the delivery wagon in the manner in which it was then loaded.

Second.—Errors of law committed by the Court at the trial of said action and excepted to by the defendant as follows:

(a) The Court erred in admitting the X-ray picture, Plaintiff's Exhibit "A," in evidence over the objection of defendant taken at the time on the ground that it was not proven to be a picture taken by an operator of an X-ray machine and had not been properly identified and that if it was an X-ray picture of the plaintiff's leg the time when it was taken was too remote from the trial and did not show the present condition of the plaintiff's leg. The evidence of the plaintiff on the subject was that an X-ray picture was taken on the 12th day of January, 1923, some five weeks before the trial. That the picture taken was developed in a dark room of Dr. Thompson's office at Anchorage, Alaska, while the plaintiff waited. That the picture that was taken was left in Dr. Beeson's possession and that Exhibit "A" is an X-ray picture sent to plaintiff shortly before the trial by registered mail, sent to the plaintiff from Anchorage, Alaska, to Valdez, Alaska. There is no evi-

dence showing that plaintiff's Exhibit "A" was the X-ray picture heretofore taken on the 12th day of January, 1923, of plaintiff's leg.

(b) The Court erred in overruling defendant's objection to the question put to Dr. Bulkley by plaintiff's attorneys as follows: "Handing you Plaintiff's Exhibit 'A' I will [146] ask you to examine that exhibit. From the examination you have made of plaintiff's leg what can you say as to the film." Mr. Dimond objected to the question as the witness had not shown himself competent to testify as to the film and we raised the same objection to this testimony as to the film because Dr. Beeson is not here to testify as to the taking of the same and the testimony is mere hearsay. Witness Sullivan is not competent to testify.

"You may state what that picture shows to you (referring to the X-ray picture)" to which question Mr. Dimond interposed the same objections as last stated, which objections were overruled by the Court and the exceptions allowed.

The Court erred in denying defendant's motion to strike all the testimony of Dr. Bulkley in regard to the X-ray picture, Plaintiff's Exhibit "A," from the testimony on the ground that there was no foundation for it in the pleadings and that the said X-ray picture, Plaintiff's Exhibit "A." had not been sufficiently identified to which ruling defendant excepted and the exception was allowed.

The Court erred in overruling the several other objections made by defendant to the introduction

of testimony offered by the plaintiff and in sustaining several other objections made by the plaintiff to the introduction of evidence offered by the defendant to which rulings of the Court the defendant then and there excepted and the exceptions were allowed, all of which more fully appears from the transcript and proceedings of the trial.

(c) The Court erred in denying defendant's motion made at the close of plaintiff's testimony for a nonsuit of plaintiff's cause of action which said motion for nonsuit is as follows:

> "Comes now the above-named defendant, at the close of plaintiff's testimony and moves this Court for an order granting a nonsuit against the plaintiff and dismissing the case [147] following grounds:

1. The complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant in this, that the plaintiff in his complaint has failed to plead facts sufficient, if true, to make Fred Fredrickson a vice-principal of said defendant in his action and conduct in relation to the accident which caused the injury of which plaintiff complains.

2. That plaintiff has wholly failed by his evidence to prove that the said Fred Fredrickson acted as vice-principal in his action and conduct in relation to the accident which caused the injury of which plaintiff complains.

3. That it is clearly shown by plaintiff's testimony that if said Fred Fredrickson was guilty of

any negligence it was the negligence of a fellow-servant and not of a vice-principal.

4. That upon the evidence introduced by plaintiff it clearly establishes the fact that plaintiff, by his conduct at and immediately before the time of the accident, assumed the risk which resulted in the accident which caused the injuries complained of.

5. That it is established by the evidence of the plaintiff that the accident which caused the injury complained of was brought about through the sole negligence of plaintiff and, therefore, he is guilty of contributory negligence which bars his recovery against the defendant in this action."

To which ruling of the Court the defendant did then and there duly except and the exception was allowed.

(d) The Court erred in denying defendant's motion made at the close of all the testimony for an order directing the jury to find a verdict for the defendant and against the plaintiff, which said motion was as follows:

> "The defendant, at the close of all the evidence, now moves this Court to instruct the jury to find a verdict for the defendant and against the plaintiff on the following grounds:
>
> 1. The complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant in this, that plaintiff in his said complaint has failed to plead facts sufficient, if true, to make Fred Fredrickson a vice-principal of the defendant

in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

2. The plaintiff has wholly failed to prove that said Fred Fredrickson, was a vice-principal of defendant or acted as vice-principal of defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains. [148]

3. That it is clearly shown by the plaintiff's testimony that if said Fred Fredrickson was guilty of any negligence it was the negligence of a fellow-servant and not that of the vice-principal of defendant.

4. The evidence introduced by plaintiff clearly establishes the fact that plaintiff, by his conduct at and immediately before the time of the accident, assumed the risk which resulted in the accident which caused the injuries complained of.

5: That it is clearly established by the testimony of the plaintiff that the accident which caused the injuries complained of was brought about by the sole negligence of plaintiff and, therefore, he is guilty of contributory negligence which bars his right to recover in this action.''

To which ruling of the Court the defendant did then and there duly except and the exception was allowed.

(e) The Court erred in giving the second paragraph in the Court's instruction No. 5 to the jury

as the law governing any part of the evidence offered at the trial of this action for the reason that said instruction does not correctly state the law, in that the Court assumes that if Fredrickson had any authority to direct the plaintiff as to the manner in which the plaintiff performed his work then Fredrickson was a vice-principal of defendant and the Court further assumes in said instructions that if the plaintiff was subject to Fredrickson's orders or that Fredrickson was responsible for the way in which the wagon was loaded, including the quantity of said load then Fredrickson was a vice-principal of plaintiff which is not the law, to which portions of said instruction No. 5 defendant excepted in the presence of the jury and said exception was allowed. The portion of instruction No. 5 excepted to is as follows:

> "If you find from the evidence that Fredrickson had no authority to direct the plaintiff as to the manner in which he performed his work, then he was not a vice-principal but he and the plaintiff were fellow-servants and plaintiff cannot recover even though you should find that his injury was due in whole or in part to some negligent action of Fredrickson. His right to recover in this action is dependent upon his showing by fair preponderance of the evidence that he was subject to Fredrickson's orders, and that Fredrickson was responsible for the way in which the wagon was loaded, including the quantity of said load." [149]

While the instruction reads 'if the jury finds from the evidence that Fredrickson had no authority to direct the plaintiff, etc.,'' the jury must have understood it to be that if they found that if he did have authority to direct the plaintiff in his work, then Fredrickson was a vice-principal and this construction of the law is directly opposed to the well-establishel principle of law governing masters and servants. In this matter as shown by the evidence, Fredrickson and the plaintiff were carrying out the details of their work, that is the operative part of the work and the acts complained of in regard to what Fredrickson may have done pertain merely to the duties of an operative and not a nondelegable duty of the defendant.

(f) The Court erred in giving instruction No. 6 to the jury as the law governing any part of the evidence offered at the trial of this action, for the reason that said instruction does not correctly state the law and is contrary to the law governing the evidence offered at the trial of this cause, to which instruction the defendant excepted to in the presence of the jury and said exception was duly allowed. Said instruction No. 6 is as follows:

> ''You are instructed that it is not sufficient to entitle the plaintiff to recover in this case to show a negligent breach of duty on the part of defendant corporation or its responsible agent, but it devolves upon the plaintiff to show further that such breach of duty was the proximate or immediate cause of his injury. If the plaintiff in an important degree or way

contributed to the accident he was guilty of what is known in law as contributory negligence. In such case the law disregards the negligence to the defendant and makes the negligence of the plaintiff a bar to his recovery. You have already been instructed that a servant entering into employment assumes all the natural risks and hazards of the work. in this case if you find that the accident was due to any unusual conditions you are to determine from all the evidence in the case whether or not plaintiff was so bound by the orders given him by Fredrickson, if orders were given him, that he could not without disobeying orders so shape his conduct as to avoid the unusual risk. If he could have so acted in the emergency by the exercise of reasonable prudence and foresight such as may be expected of any ordinary man in a like situation, and failed to do so, he was guilty of contributory negligence and is not entitled [150] to recover. The jury are instructed that a servant is as a general rule excusable for obeying orders in and about his master's business, when such orders are given by the master or by one in authority over the servant, as the representative of the master, unless the danger to be incurred by such obedience is so plain and manifest that no prudent person would attempt obedience, even under orders from one having authority over him, and although there be apparent danger in obeying the mas-

ter's orders, yet such knowledge on the part of the servant will not, of itself, defeat a recovery, if the danger is not glaring and such as threatens immediate injury."

In this instruction the Court leaves the question to the jury to find out as to whether or not the plaintiff was bound by the orders given him by Fredrickson, and that he could not without disobeying orders so shape his conduct as to avoid the unusual risk. The plaintiff shows that he realized the risk of taking on the alleged additional load and that he was told that he could take it or quit. Therefore, the plaintiff had ample opportunity to decline taking the said additional load but he voluntarily assumed any risk that was entailed thereby. The uncontradicted testimony establishes that Fredrickson did not have authority to hire or discharge the plaintiff or any other employee of the defendant and the evidence further shows that if Fredrickson did give any such orders they concerned the details or operative part of the work for which Fredrickson and the plaintiff were employed by the defendant and were not orders concerning any nondelegable duty of the defendant.

(g) The Court erred in giving paragraph No. 1 of instruction No. 7 to the jury as the law governing any part of the evidence offered at the trial of this action for the reason that said instruction does not correctly state the law and is contrary to the law governing the evidence in this case to which portion of said instruction No. 7 the defendant excepted in the presence of the jury and said

exception was allowed. The portion of instruction No. 7 thus excepted to is as follows: [151]

> "That plaintiff is entitled to recover if he has proven by a fair preponderance of the evidence that his injury was the result of an unusual risk which he assumed under the direct orders of a vice-principal of the defendant corporation, and that he was guilty of no contributory negligence which aided materially in producing the accident, that is, under the circumstances he acted as might be expected of an ordinary prudent and careful man in his situation."

This instruction is not the law governing the evidence in this case for the reason that the Court instructed the jury in effect that if Fredrickson had authority to give the plaintiff any instructions whatever as to the manner in which he performed his work then Fredrickson was a vice-principal of the defendant which is not the law. The evidence clearly establishes that any of the alleged instructions given by Fredrickson to plaintiff were not instructions concerning nondelegable duties of the defendant but were instructions only concerning the details of or operative part of the work being performed by Fredrickson and the plaintiff under their employment by the defendant and in that matter Fredrickson was a fellow-servant of the plaintiff. Said instruction is also contrary to the law because the Court leaves it to the jury to determine whether the plaintiff was guilty of contributory negligence, which under the testimony of

plaintiff should not have been done. Plaintiff's testimony clearly shows that he knew of the danger driving down B Avenue with the wagon loaded as he testified it was loaded and the uncontradicted testimony of Lund, a witness for the defendant shows that no careful or prudent man would have driven the wagon down B Street loaded as the plaintiff claims this wagon was loaded.

(h) The Court erred in giving subdivision (B) of paragraph 2 of instruction No. 7 to the jury as the law governing the evidence in this case for the reason that said portion of said instruction No. 7 does not correctly state the law as applied to the evidence in this case, to which portion of said instruction the defendant [152] in the presence of the jury duly excepted and the exception was allowed. Said portion of said instruction is as follows:

> "If he was injured through the act of a fellow-servant, that is the act of an employee who had no controlling authority over him in the circumstances."

This portion of said instruction is a summary statement of the law given by the Court to the jury governing the relations of master and servant and purports to be a definition of what a fellow-servant is. It in effect tells the jury that Fredrickson was not a fellow-servant of the plaintiff if Fredrickson had any control or authority over him. The instruction is vague and misleading as to the words "control and authority," and the jury might well have taken such words to mean any authority

to direct the plaintiff in any manner as to the performance of his work which is not the law governing the evidence in this case or covering generally the relations of master and servant.

(i) The Court erred in giving instruction No. 8 to the jury as the law governing any part of the testimony in this case offered at the trial for the reason that the same does not correctly state the law in that there is no grounds or substantial basis in the evidence on which the jury could base a verdict in favor of the plaintiff and against the defendant for any sum whatever. To this instruction the defendant duly excepted in the presence of the jury and the exception was allowed. Instruction No. 8 is as follows:

> "If you find that plaintiff is entitled to recover you will include in the amount of his recovery whatever reasonable sums he has paid for medical and hospital treatment; second, such sum as will compensate him for his loss of time from work; third, such sum as the jury may find he is entitled to receive for the mental and physical pain and suffering he has undergone as the result of his said injury. This latter sum is difficult of exact computation since pain and suffering cannot be measured in money. The amount allowed is left to the sound discretion of the jury. The total must not exceed the amount asked in plaintiff's complaint, to wit, $6358.00."

(j) The Court erred in refusing to give defendant's instruction No. 2 requested by the defendant

to be given to the [153] jury for the reason that the same is not covered by other instructions given by the Court and should have been given to the jury as the law governing plaintiff's assumptions of risk under all the evidence offered at the trial. Said requested instruction No. 2 is as follows:

> "You are instructed that the plaintiff's own testimony shows that he remained on the wagon to which he has testified at the time when the wagon was being loaded by the defendant's employee Fred Fredrickson, and when he had ample opportunity to remove himself to a place of safety. By so doing the plaintiff, knowing, as he has pleased, the condition of the streets of the town of Cordova, and particularly the condition of B Street in said town, assumed all of the risks incident to his remaining on said wagon and attempting to drive with it down said B Street, and the defendant is not liable for the injuries plaintiff thus suffered."

To which refusal of the Court the defendant duly excepted in the presence of the jury and the exception was allowed.

(k) The Court erred in refusing to give instruction No. 4 requested by the defendant to be given to the jury for the reason that the law therein contained is not covered by other instructions given by the Court and should have been given by the Court to the jury as the law covering the plaintiff's assumption of risk and his contributory negligence as shown by the evidence offered at the trial. Said requested instruction No. 4 is as follows:

"I instruct you that a servant assumes the ordinary risks of his employment and is bound to exercise his own skill and diligence to protect himself and unless you find from the evidence that the plaintiff exercised due skill and diligence to protect himself in choosing the route down B Avenue over the snow and ice in preference to the route of B Avenue to Second Street then you must find for the defendant."

To which refusal of the Court the defendant duly excepted in the presence of the jury and the exception was allowed.

Dated at Valdez, Alaska, this 26th day of February, 1923.

DONOHOE & DIMOND,
Attorneys for Defendant.

Receipt of the foregoing "motion for a new trial" is hereby acknowledged by receipt of copy of same duly certified to as such true copy by Anthony J. Dimond, one of the attorneys for the defendant.

Dated at Valdez, Alaska, February 26, 1923.

L. V. RAY,
One of Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 6, 1923. W. N. Cuddy, Clerk. By ————, Deputy. [154]

February 1, 1923, Term of Court, Valdez, Alaska, June 6, 1923—38th Court Day.

In the District Court for the Territory of Alaska, Third Division.

No. C-246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

Defendant.

Minutes of Court—June 6, 1923—Order Denying Motion for New Trial.

Defendant's motion for a new trial of this cause having been heretofore argued by counsel and taken under advisement by the Court, after consideration thereof said motion is by the Court denied, to which order and ruling of the Court the defendant then and there excepted and the exception was by the Court allowed. [155]

In the District Court for the Territory of Alaska, Third Division.

No. C–246.

J. F. SULLIVAN,

Plaintiff,

vs.

THE BLUM–O'NEILL COMPANY, a Corporation,

Defendant.

Opinion on Motion for a New Trial.

Various assignments of error are set up by counsel for defendant in support of its motion for a new trial, but I am satisfied that only one error, if any, was made by the Trial Court, and that may have been in denying the motion for an instructed verdict at the close of all the evidence. I think the motion for a nonsuit was properly denied at the end of plaintiff's evidence because it appears to me that the positive testimony of the plaintiff, corroborated in some degree by Mrs. Satterlee, made a *prima facie* case. After carefully reading the motion for a new trial I am unable to agree with counsel that there was any important error made in the admission or exclusion of evidence or in the instructions.

The question of the correctness of the Court's action in denying the motion for an instructed verdict at the close of all the evidence has been a very perplexing one and I am not yet fully assured that I was right in denying that motion.

Under the conflicting authorities a cogent argument can me made either way with probably almost an even balance of precedents. I have decided to stand by the ruling denying the motion for the reason that the general tendency of Courts of late years has been to leave every disputed question of fact to the jury. This is true [156] even in jurisdictions which do not have the provision of the Alaska code that the jury are the exclusive judges of the facts and of the credibility of the witnesses. The modern rule is laid down by the Supreme Court in Kreigh vs. Westinghouse, 214 U. S. 249–258:

> "Questions of negligence do not become questions of law to be decided by the Court, except 'where the facts are such that all reasonable men must draw the same conclusion from them, and the case is not to be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. Gardner vs. Mich. Cent. Railroad, 150 U. S. 349, 361."

It is true that the question raised by the motion for an instructed verdict is not wholly one of negligence. It involves the question of the alleged representative character or vice-principalship of Frederickson, which is a question of mixed law and fact. Nevertheless, in view of the decisive conflict in the evidence both as to Frederickson's authority and as to his actions and those of the

plaintiff immediately preceding the accident complained of, it appears to me that under the modern rule there was sufficient evidence on that point to go to the jury. In arguing that Frederickson was clearly a fellow-servant of Sullivan, which was without doubt generally true, defendant's counsel overlooked the principle of law laid down by themselves:

> "Whether an injury to a servant was caused by the negligence of a fellow-servant depends upon the nature of the action in the performance of which the employee was negligent, and not upon the employee's rank or grade." (Mast. vs. Kern, 54 Pac. 950, and other cases.)

The rule is well stated by Labatt, volume 4, sections 1434–1435:

> "Sec. 1434. Representative character of servant depends on the actual functions discharged by him.—Whether the employee whose negligence caused the injury was or was not a vice-principal is determined by the nature of the functions which he was, as a matter of fact, discharging at the time when the injury was received, and not by the appellation by which he was designated. His official [157] denomination will not, of itself, determine whether or not he was a representative of the master. Nor does a rule the effect of which is to cast upon him certain functions under the circumstances specified operate so as to alter the legal relations which would, apart from the rule, be held to exist between him and the

other employees. Nor is the fact that the injured servant believed the negligent employee to be a vice-principal, and was not aware that he had been discharged in that capacity, a sufficient ground for allowing the action to be maintained. Nor will the mere fact that the subordinate believed in good faith that he had been told by the employer to obey the directions of another employee enable the subordinate to recover for the negligence of that employee, if, as a matter of fact, no such instructions were given.

The mere fact that a vice-principal exercised his authority through an intermediary clearly cannot affect the extent of the employer's responsibility. Nor is it material, in a case where injury was caused by following the directions of a vice-principal, that he himself was temporarily absent when those directions were being carried out.

Sec. 1435. Temporary vice-principals.—Both on principle and authority it is manifest that a master is no less responsible for the negligence of an employee who is temporarily filling the position of an *alter ego* than he is for the negligence of an employee who holds that position permanently.

In determining the question whether the relation of temporary vice-principalship existed between the negligent and injured persons at the time of the accident, the essential circumstance to be considered is the nature

of the functions discharged by the alleged vice-principal. In some instances the exercise of those functions will have resulted from his compliance with the provisions of a rule, the effect of which was that, in a specified contingency, he was to exercise certain powers. In such cases the employer incurs no responsibility unless, at the time of the accident, the subordinate had actually passed under the control of the temporary vice-principal. Nor will the substitute be considered a vice-principal if it is apparent that he was not exercising some power or function which was an essential attribute of the position held by the employee whose place he had taken.

Since the powers of a temporary vice-principal can in no case be greater than those of the permanent one, the master is not responsible if those powers are exceeded by the substitute."

In section 1433, the same learned author, in discussing generally the application of the fellow-servant rule, makes the following forceful statement regarding the conflict of authority: [158]

"Sec. 1433. General Statement.—None of the courts, even those which have applied the doctrine of common employment in its most rigorous and sweeping form have gone to the length of asserting that it is absolutely and invariably controlling in all cases in which a master is being sued for injuries caused by the negligence of a fellow-servant of the injured

person. It is conceded that a portion, at least, of those cases are governed by the rule embodied in the maxim, *respondeat superior.* But with regard to the precise extent of the domain which is covered by each of these two antagonistic principles, there is an extraordinary diversity of judicial opinion. The decisions on the subject, indeed, are conflicting to a degree which, it may be safely affirmed, is without a parallel in any department of jurisprudence. To attempt to reconcile these decisions, or even to suggest grounds upon which, as rulings with respect to specific facts, they may be reconciled, would be to attempt an impossible and unfruitful task. The utmost that the commentator can aim at, with any hope of attaining success, is to group the authorities under categories which will enable the reader to comprehend, as nearly as may be, the extent to which the courts diverge from, or agree with, one another in regard to the various subsidiary issues through which an answer to the main question has been sought."

The position taken by this Court is the following: In view of the hopelessly conflicting precedents on this subject, not ony in different jurisdictions but in the same jurisdiction over and over again, the proper rule to adopt is to follow the modern authorities. The fellow-servant rule in the earlier years of its history never gave rise to any such decisions as those quoted by counsel for defendant. The Whelan case, the Martin case and

the Peterson case, and other similar cases so strongly relied on by counsel, were all decided in the last decade of the nineteenth century when the Supreme Court, as then constituted, overruled repeated decisions made by the same court. Many of the federal and state courts made similar decisions in that decade and the one following, using the Supreme Court decisions as authorities. It is true that none of those cases has been expressly overruled but the Supreme Court itself in the last decade and a [159] half has made repeated decisions so utterly inconsistent with those cited that the action of the court amounts to overruling the earlier ones. The most decisive case is the one already quoted, that of Kreigh vs. Westinghouse. The opinion by Mr. Justice Day contains statements which amount to a denial in argument of the position taken by the court in the cited cases. For example, the following:

> "The duty of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character. As late as Santa Fe & Pacific R. R. Co. vs. Holmes, 202 U. S. 438, it was declared: The duty is a continuing one and must be exercised whenever circumstances demand it.'
>
> Where workmen are engaged in a business, more or less dangerous, it is the duty of the master, to exercise reasonable care for the safety of all his employees, and not to expose them to the danger of being hurt or injured

by the use of a dangerous appliance or unsafe place to work, where it is only a matter of using due skill and care to make the place and appliances safe. There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer. Choctaw, Oklahoma & R. R. Co. vs. McDade, 191 U. S. 64, 66, and cases there cited. * * *

If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff the master would be liable, notwithstanding the concurring negligence of those performing the work. Grand Truck R. R. Co. vs. Cummings, 106 U. S. 700; Deserant vs. Cerrillo Coal Railroad Co., 178 U. S. 409, 420, and cases there cited.

It is further argued that the testimony shows that the injuries to the plaintiff were solely caused by the negligence of the man operating the derrick in giving it a sudden and strong push toward the north wall, where the plaintiff was standing when injured, and it is contended that the derrick could not have injured the plaintiff but for the negligent operation thereof by the fellow-servants of the plaintiff using the same. But here again we think the question was one for the jury to determine."

The last sentence quoted, I think states the modern rule. The law changes gradually and has

been changing for centuries with the growth of civilization and the development of different [160] conditions in society and different ways of viewing social and economic questions. The extreme position taken by the courts at the end of the nineteenth century in making a fetish of the fellow-servant rule was so repugnant to the popular sense of justice that legislation quickly followed abolishing the fellow-servant rule in many cases. This was done both by congress and by the states. Many of the states have abolished the rule wholly. Following this change in public opinion, not to say the public conscience, the courts have receded from the extreme views of a quarter of a century ago. They have done this even where no new statute compelled it. The change in the decisions of the Supreme Court is the strongest testimonial to this fact. The most striking instance is Kreigh vs. Westinghouse. In that case a nonsuit was granted by the Circuit Court for the western district of Missouri and this judgment was affirmed by the Circuit Court of Appeals of the Eighth Circuit, in an opinion by Judge Sanborn. Judge Sanborn is admittedly one of the ablest Circuit Judges in the country but he still retains the views on the fellow-servant rule which prevailed two or three decades ago. When the Kreigh case went to the Supreme Court the decision of both lower courts was reversed and the case remanded for a new trial. The decision was unanimous and much of the opinion by Mr. Justice Day has already been

quoted. I mention this because counsel relies so strongly on certain opinions by Judge Sanborn.

The issue presented to the Court on this part of the motion for a new trial is contained in the following disputed testimony: Plaintiff testified that when he had a large load on his wagon and had driven a short distance from the warehouse into the street he was stopped by Frederickson and told to take several [161] cases of goods to the store on First Avenue. Plaintiff insisted he had load enough already and could not carry any more; that Frederickson insisted he should take the other articles and proceeded to throw them upon the footboard of the wagon, some of them being left there and others being placed upon the seat; that just as this was done the horse started down the hill and plaintiff was unable to control the animal because of his position among the boxes on the seat, and that the accident was caused by this fact. On the other hand Frederickson testified that Sullivan himself, after he was loaded, proposed to get another case of goods and did so although Frederickson told him he had load enough already. Frederickson also claimed that he advised Sullivan to drive up to Second Avenue, which was clear of snow. If Frederickson's testimony is correct Sullivan was clearly guilty of contributory negligence and his action would be barred on that ground if no other. Frederickson was corroborated to some extent by Dudley Allen and Sullivan in a slight degree by Mrs. Satterlee. Surely this conflicting testimony presented an issue of fact

which was for the jury to determine unless the admitted facts or testimony of the plaintiff was such as to make it the duty of the court, as matter of law, to decide that Frederickson in all he did was a fellow-servant of Sullivan, in which case the defendant corporation would not be liable. It is not disputed that the fellow-servant rule and the law of the assumption of risk and contributory negligence all apply to this case, since none of them in the kind of employment in which Sullivan and Frederickson were engaged is in any way affected by any statute.

It is to be determined by the Court then if facts were presented which required the submission to the jury of the issue whether or not Frederickson in the action he took was a vice-principal of the defendant corporation. It is only on the [162] testimony of the plaintiff that such a finding could be made. Plaintiff's testimony was positive and he was unimpeached except so far as he was contradicted by other witnesses. Certainly there was an issue of fact to be decided. The question is, was it a question of fact for the Court to submit to the jury? I think it was. Whatever may be my personal opinion of the weight of the evidence or the preponderance of the evidence, all questions of fact are for the jury. The law already quoted lays down the rule that even a fellow-servant may for a brief time be discharging a duty of the employer, and I cannot agree as counsel argue, following the statement of Judge Sanborn in Union Pac. vs. Marone, 246 F. concerning the difference

between operation and provision, that accepting any state of the facts, whatever was done by Sullivan and Frederickson were acts of operation and not of provision. It is seldom that any decision emphasizes as strongly as does Judge Sanborn's in the Marone case the distinction between operation and provision. As a matter of fact in many cases it appears to me that one runs into the other so it is difficult to draw a line of demarcation between them, and that this is one of those cases.

Plaintiff's case rests upon his claim that his place to work was rendered unsafe by the action of Frederickson; that he was under Frederickson's orders so far as Frederickson chose to give them in the matter of loading the wagon and the quantity of load he carried; that he protested against the additional load and before he had an opportunity to adjust himself to the situation the horse started and he was then compelled to do the best he could under the circumstances. It is argued by counsel for defendant that he could have quit his job. It might be argued also that he could have jumped out of the wagon and let the horse and wagon go. This latter act would have been criminal negligence because of the danger to people in the street. As for quitting his job under the circumstances, he had practically no time to think and it is another accepted rule of law that when a [163] servant is injured in obeying a sudden order which places him in a dangerous situation the master is liable. (See Labatt, Sec. 1357, etc.)

This presents to me the following situation: If plaintiff's testimony is true his place of work was made unnecessarily dangerous on short notice without his having sufficient time either to protect himself or to decide that he was not willing to accept the risk. It was a dangerous situation suddenly forced upon him by a person who had sufficient authority over him to place him in that situation. In creating that situation Frederickson was acting for the employer of both men. He was fixing the place where Sullivan had to work. He was acting for the corporation and he did not take reasonable care to provide a reasonably safe place to work. He denies plaintiff's testimony *in toto,* and that presented an issue of fact for the jury to determine. The jury has a right to pass upon an issue of fact involving an alleged vice-principalship as much as they have on any other issue of fact presented by the testimony in any case.

I repeat, the question is very close and there was barely enough evidence on the question of vice-principalship to induce me to submit it to the jury. I am not sure I was right in the ruling but I believe that I was and will leave it to a higher Court to decide whether or not I was wrong. On this question of leaving all facts to the jury I wish to cite the following recent cases in Federal Courts in which it was held upon widely varying issues in different cases that questions of fact are for the jury to determine: Myers vs. Pittsburgh Coal Co., 233 U. S. 184; Tex. & Pac. R. Co. vs. Prater, 229 U. S. 177; C. R. I. & P. R. Co. vs.

Brown, 229 U. S. 317; Tex. & Pac. R. Co. vs. Harvey, 228 U. S. 319; Brewery Co. vs. Schmidt, 226 U. S. 162; Davis vs. Scroggins, 284 F. 760; Dahlen vs. Hines, 275 F. 817; Gunn vs. Standard Oil, 275 F. 932; St. L. R. Co. vs. Jefferys, [164] 276 F. 73; Woodward vs. Limbaugh, 276 F. 1; Gover vs. A. P. A., 278 F. 927 (this was an Alaska case in the Ninth Circuit); Davis vs. Reynolds, 280 F. 363; Watson Coal & M. Co. vs. Greeson, 284 F. 510; Atlantic Coast Line R. Co. vs. Williams, 284 F. 262; Collins vs. Barner, 268 F. 699 (a case of a badly loaded elevator); Patton vs. Kenmont Coal Co., 268 F. 334; Dunton vs. Hines, 267 F. 452; Southern R. Co. vs. Miller, 267 F. 376; Gibson vs. Germat, 267 F. 305; McMillan vs. Alaska Fish Co., 266 F. 26 (another Alaska case in the Ninth Circuit).

In Beatson Copper Co. vs. Pedrin, 217 F. 43, the Circuit Court of Appeals for the Ninth Circuit held in effect that the question of vice-principalship was one for the jury. In that case Pedrin and another miner had been ordered into the glory hole immediately after the firing of a shot in a wall. One of the men protested that the wall should be examined first, but the shift boss assured them that it was safe and ordered them immediately to work in the glory hole. A slide came shortly afterwards and Pedrin was badly injured. It was urged by the defendant corporation in that case as in this, that the shift boss was a fellow-servant of Pedrin. The appellate court did not directly rule on this point but held the evidence sufficient to support

the judgment. In concluding the opinion, Judge Ross said: "The evidence we think was such as to make the case a proper one for the submission to the jury under appropriate instructions."

The case of Stewart vs. Newby, 266 F. 287, is cited by counsel for defendant. This case was reversed in the Fourth Circuit for errors in the admission of testimony and in the instructions, but in the opinion the Court said, discussing [165] the principles by which it can be determined whether one is a vice-principal or fellow-servant, "It is certain now that the test is duty and not rank, and is determined by obligation rather than authority." The Court further said, in discussing the nondelegable duty of the master to furnish servants with a reasonably safe place to work, "What constitutes due care or negligence in any particular case is ordinarily a question of fact for the jury."

The other questions raised by the motion for a new trial will be discussed briefly. I think the complaint stated a cause of action and that the plaintiff's testimony corresponded sufficiently to the allegations.

I do not think any error was committed in admitting the X-ray photograph. All that is required in such cases is that the photograph be sufficiently identified. Plaintiff testified he saw the photograph after it was taken and he was sure the plate was the same. His credibility on that point was for the jury. In the use of the plate a clear distinction was made between what the plate

showed and Dr. Bulkley's testimony as to what he had himself found upon an examination of the plaintiff. In the latter he made no use of the plate.

Defendant criticises the second paragraph in the Court's instructions, No. 5, saying "That the Court assumes that if Frederickson had any authority to direct the plaintiff as to the manner in which the plaintiff performed his work then Frederickson was a vice-principal of defendant." It is difficult to read that meaning from this instruction. The instruction is that plaintiff's right to recover was dependent upon his showing that he was subject to Frederickson's orders and that Frederickson was responsible for the way the wagon was loaded, including the quantity of said load. The whole must be read together and the meaning is plain that if he was subject [166] to Frederickson's orders in the matter of loading the wagon then the corporation would be liable if Frederickson was guilty of negligence which places plaintiff in an unnecessarily dangerous position. All this is made plain by the other instructions, and Courts have decided so often that instructions must be taken as a whole and that if one instruction is obscure but is explained by others there is no error, it seems hardly necessary to argue this matter any further.

Instruction No. 6 is criticised but I see no error in it and none that impresses me is suggested by counsel's argument.

Paragraph 1 of instruction No. 7 is criticised because it is claimed that the following statement,

> "Plaintiff is entitled to recover if he has proven by a fair preponderance of the evidence that his injury was the result of an unusual risk which he assumed under the direct orders of an officer of the defendant corporation"

is an instruction in effect that if Frederickson had authority to give the plaintiff any instructions whatever as to the manner in which he performed his work then Frederickson was a vice-principal. It is difficult to see how counsel arrives at the conclusion that an instruction that if the injury was the result of an unusual risk assumed under the direct orders of a vice-principal plaintiff is entitled to recover, is a statement that if Frederickson had authority to give the plaintiff any instructions whatever that made Frederickson a vice-principal.

I am unable to see any force in the other exceptions to the instructions, and the grounds for refusing some of the instructions asked by defendant are sufficiently stated in the memorandum written upon those requested instructions at the time.

The motion for a new trial is, therefore, denied.

Dated at Valdez, Alaska, June 6, 1923.

E. E. RITCHIE,
District Judge.

Filed in the District Court, Territory of Alaska, Third Division. Jun. 7, 1923. W. N. Cuddy, Clerk. By ————, Deputy. [167]

In the District Court for the Territory of Alaska, Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

Defendant.

Judgment.

This action having been brought on regularly for trial on the 20th and 21st days of February, 1923; the said parties theretofore appearing by their attorneys; a jury of twelve persons having been regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the court, the jury retired to consider their verdict, and subsequently on the 22d day of February, 1923, returned into court and being called, answered to their names and say they find a verdict for the plaintiff in the sum of $2250. A motion for a new trial having been interposed by defendant and filed herein within the time prescribed therefor by law,

the same was argued before the court on the 27th day of February, 1923, and the Court took the same under advisement, and on the 6th day of June, 1923, did deny said motion for a new trial.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is considered and adjudged and ordered that said plaintiff have and recover from said defendant the amount allowed him by the verdict of the jury as aforesaid, to wit, the sum of Two Thousand Two Hundred Fifty Dollars ($2,250.00), with interest thereon at the rate of eight per centum per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action amounting to the sum of $——.

Judgment rendered the 21st day of June, 1923.

E. E. RITCHIE,
Judge.

Filed in the District Court, Territory of Alaska, Third Division. June 21, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy.

Entered Court Journal No. 13, page No. 875.
[168]

February 1, 1923, Term of Court, Valdez, Alaska, June 21, 1923—41st Court Day.

In the District Court for the Territory of Alaska, Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

Defendant.

Minutes of Court—June 21, 1923—Order Extending Time Sixty Days to Settle Bill of Exceptions.

On motion of Messrs. Donohoe & Dimond, attorneys for defendant, it is

ORDERED that defendant have sixty days within which to prepare, file and settle bill of exceptions on writ of error.

IT IS FURTHER ORDERED that the supersedeas and cost bond on writ of error be fixed at Three Thousand and No/100 Dollars ($3,000.00). [169]

In the District Court for the Territory of Alaska,
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM–O'NEILL COMPANY, a Corporation,

Defendant.

Order Amending Minute Order.

Upon the application of the Blum-O'Neill Company, defendant above named, and good cause appearing therefor, it is

ORDERED that the minute order heretofore entered by the Court on February 21st, 1923, permitting the defendant to file its second amended answer be and the same is hereby amended so as to read as follows:

> "On stipulation between counsel for the plaintiff and the defendant in open court, it is
>
> ORDERED that the defendant may file its second amended answer in this cause, and that the reply of the plaintiff to defendant's first amended answer heretofore filed may stand as plaintiff's reply to defendant's second amended answer."

This being the stipulation made by the parties in open court at the time.

This order is made this 30th day of July, 1923, *nunc pro tunc* as of February 21st, 1923.

E. E. RITCHIE,
District Judge.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 30, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy.

Entered Court Journal No. 13, page No. 895. [170]

In the District Court for the Territory of Alaska, Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

Defendant.

Order Settling and Certifying Bill of Exceptions.

This cause having come on regularly for hearing on motion of the defendant, the Blum-O'Neill Company, for an order settling and certifying its bill of exceptions to be used upon its writ of error about to be prosecuted in said cause to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment of the above-named Court made and entered herein on the 21st day of June, 1923, in favor of the plaintiff and against the defendant,

the Blum-O'Neill Company, a corporation, as in said judgment set forth; and it appearing that said defendant has submitted to the court its proposed bill of exceptions, and served a copy of the same upon counsel for plaintiff, and that the court made herein an order fixing the time for the settlement and filing of said bill of exceptions at the hour of ten o'clock in the forenoon on this tenth day of July, 1923, and forthwith gave due notice of the time and place for the settlement and filing of said bill of exceptions to the counsel for plaintiff; and no amendments or objections to said bill of exceptions having been made by said plaintiff, and the undersigned Judge of said District Court, being the same judge who presided at the trial of said cause and who made the order entering said [171] judgment, having inspected and considered said bill of exceptions and found the same to contain all of the papers, pleadings, proceedings, exceptions and original exhibits necessary to a determination of the questions involved and raised by defendant's (The Blum-O'Neill Company) exceptions,—

IT IS THEREFORE ORDERED, that the foregoing bill of exceptions be and the same is hereby allowed, approved and settled and that the same shall be and constitute defendant's (The Blum-O'Neill Company) bill of exceptions upon the prosecution of its writ of error in said cause.

AND IT IS FURTHER ORDERED, that this order shall be deemed and taken as a certificate of the undersigned Judge of this Court that such bill of exceptions consists of all the papers, pleadings,

proceedings and exceptions filed, presented, had, done, and taken in said cause, with all the original exhibits essential to the determination of said cause, and all of the matters considered by said Court in making and entering said judgment of June 21, 1923, in favor of said plaintiff and against said defendant, The Blum-O'Neill Company, as in said judgment specifically set forth, and of all of the matters and things necessary or proper for the determination of the questions involved herein, or raised or attempted to be raised, by the exceptions taken by said defendant at the trial of said cause, and in the proceedings had in connection with such judgment.

Done at Valdez, Alaska, this 30th day of July, 1923.

E. E. RITCHIE,
District Judge.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 30, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy.

Entered Court Journal No. 13, page No. 896. [172]

In the District Court for the Territory of Alaska,
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

Comes now the defendant as plaintiff in error herein and says:

That on the 21st day of June, 1923, the above-named Court in the above-entitled cause made and entered its judgment in favor of the above-named plaintiff, defendant in error, against the above-named plaintiff in error.

That in said judgment, and in the proceedings had prior thereto, certain errors were committed to the prejudice of the said defendant, and plaintiff in error, The Blum-O'Neill Company, all of which more fully appears in the assignment of errors filed with this petition.

WHEREFORE, the said defendant and plaintiff in error prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, and that a transcript of the record, testimony, proceedings and papers in this cause, duly authenticated, may be sent to the

United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may be proper.

DONOHOE & DIMOND,
Attorneys for Defendant and Plaintiff in Error.

Due service of the foregoing petition for writ of error admitted this 17th day of August, 1923.

FRANK H. FOSTER and
L. V. RAY,
Attorneys for Plaintiff and Defendant in Error.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1923. W. N. Cuddy, Clerk. By ————, Deputy. [173]

In the District Court for the Territory of Alaska, Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the defendant, The Blum-O'Neill Company, the plaintiff in error in the above-entitled action, and makes and files the following assignment of errors upon which said plaintiff in error

will rely in its prosecution of the writ of error herein.

I.

The Court erred in admitting in evidence, over the objection and exception of the defendant, Plaintiff's Exhibit "A," the same being an X-ray plate or picture, and plaintiff's evidence relating thereto. Such evidence, and the order of the Court admitting said exhibit in evidence, and the defendant's objections and exceptions thereto as shown by the bill of exceptions herein, being as follows:

Direct Examination of Mr. SULLIVAN by Mr. FOSTER.

"Q. Did you have an X-ray picture taken of this leg recently? A. Yes, sir.

Q. By whom? A. By Dr. Beeson.

Q. Where? A. Anchorage.

Q. Who took the picture?

A. Dr. Thompson and Dr. Beeson, both together. [174]

Q. When did this take place?

A. It is about a month ago.

Q. Was it the 12th of January?

A. Yes, I think it was about the 12th or 13th.

Q. And what time of day was this picture taken?

A. It was taken about, I am not sure, I think it was about two o'clock.

Q. And after the picture was taken what did Dr. Thompson do.

A. He developed it right in the room. There is a little dark room there. They developed it there.

Q. While you were present? A. Yes, sir.

Q. Handing you Plaintiff's Exhibit 'A' for identification, contained in an envelope, I will ask you to look at this plate and state whether or not that is the plate which you have testified to as having been taken and developed by Dr. Thompson in your presence on the twelfth of January?

A. Yes, sir; it is.

Q. What does that show?

Mr. DONOHOE.—It shows for itself.

Mr. FOSTER.—Well, we offer it in evidence and ask it be marked Plaintiff's Exhibit 'A.'

Mr. DONOHOE.—We object to its introduction in evidence on the ground that it is not proved to be a picture taken by an operator of an X-ray machine, and has not been properly identified.

The COURT.—I understand he says he saw it taken and developed.

Mr. FOSTER.—Has this been in your possession ever since?

A. It has been in Dr. Beeson's possession. He sent it by registered mail over here.

Mr. DONOHOE.—We renew the objection on the ground that [175] he has not had possession of the picture all the time.

Mr. FOSTER.—Is that the original picture taken in Dr. Beeson's office?

A. Yes, sir; it is. Every break in the leg is shown in that picture. It is easy to see it. A blind man could see it.

The COURT.—Objection overruled. Exception allowed.

The X-ray is admitted in evidence and will be marked Plaintiff's Exhibit 'A.' "

II.

The Court erred in admitting in evidence, over the objection and exception of the defendant, certain testimony of Dr. J. L. Bulkley, a witness for the defendant, relative to Plaintiff's Exhibit "A," and plaintiff's alleged condition as shown by the said exhibit; such testimony and the objections and exceptions of defendant thereto being as follows, to wit:

Direct Examination of Dr. J. L. BULKLEY by Mr. FOSTER.

"Q. Handing you Plaintiff's Exhibit 'A,' I will ask you to examine that exhibit. From the examination you have made of plaintiff's leg what have you to say as to that film?

Mr. DIMOND.—Object to the question as the witness has not shown himself competent to testify as to the film; and we raise the same objection to this testimony as to the film because Dr. Beeson is not here to testify as to its taking and the testimony is mere hearsay. The witness Sullivan is not competent to identify it.

The COURT.—The latter part of the objection as to the identification of the plate is overruled.

Mr. FOSTER.—They have already admitted he was qualified. [176]

Mr. DIMOND.—I will admit Dr. Bulkley can take X-ray pictures and is generally qualified as a physician.

The COURT.—Very well, you may qualify him.

Mr. FOSTER.—Have you ever taken X-ray pictures. A. I have.

Q. Have you in your practice seen many X-ray pictures?

A. I have seen some X-ray pictures; I do not know whether you would call them many.

Q. Are you familiar with the anatomy of the human form? A. Yes, sir; supposed to be.

Q. From your experience as a physician and surgeon, and from your examination and study of the X-ray, can you take a picture such as you have and from that state the general characteristics of the leg from which it was taken—the condition of the bones? A. I think I can, yes, sir.

Q. You may state what that picture shows to you?

Mr. DIMOND.—Same objection.

The COURT.—Overruled. Exception allowed.

Mr. FOSTER.—Taking into consideration your physical examination of the plaintiff?

A. I believe this X-ray negative to be a picture of the leg that I examined.

Mr. DIMOND.—We move that the answer be stricken. We will admit his general qualifications, but he has not shown his qualifications to testify as to this particular picture.

The COURT.—I am not certain about his knowledge, but it has been testified by Mr. Sullivan it is the plate taken by Dr. Beeson of his leg.

Mr. FOSTER.—It has been admitted in evidence as the picture of Sullivan's leg which was taken. [177]

The COURT.—Mr. Sullivan testified that he was present when this was taken; that the plate was developed by Dr. Beeson and he mailed it over here himself. Dr. Bulkley here testified he has examined Mr. Sullivan's leg. I don't think he should testify as to what he found from examining Mr. Sullivan's leg in connection with what the plate shows. I think they are separate.

Q. What did you find from that plate. What does that show as to the condition of the leg?

Mr. DIMOND.—We object to the question. If he made the plate he could have testified from it.

The COURT.—The objection is overruled. Exception is allowed.

A. Fracture of both bones.

Q. Recent or somewhat longstanding?

Mr. DIMOND.—Same objection.

The COURT.—The objection is overruled. Exception allowed.

A. I am unable to say. I don't think anybody could say that.

Q. What can you say as to the knitting or condition as shown by that plate of those bones?

Mr. DIMOND.—I wish the record to show that our objection goes to all the testimony of Dr. Bulkley about this plate.

The COURT.—Yes, it is understood all this goes in under objection.

Q. I will ask you this first; From your examination of Sullivan; what do you find as to the present condition of his injured leg, his maimed leg?

A. The leg itself is crooked. The bone is set. While it is set in fair alignment it is not set in perfect alignment. The upper fragment is anterior to the lower fragment. It is forward, shoved down and sort of projects.

The COURT.—Is there anything in the pleadings about improper setting? [178]

The WITNESS.—Why, that is not my attempt. I don't say it was an improper setting. In fact, I think it was set very well.

Mr. DIMOND.—We move to strike all this testimony on the ground that there is no foundation for it in the pleadings. The pleadings show he suffered a compound fracture of the leg and was compelled to pay doctor and hospital bills in the amount of $418; that he has suffered loss of wages in the sum of $150 a month; that he will be crippled for a year from the date of his injury and has suffered pain and anguish. There is nothing about any malformation of the leg.

Mr. RAY.—It is alleged in the prayer for damages that the crippled condition will probably continue for a year, and the doctor is asked to describe the condition which he finds at this time. It is merely preliminary to further questions as to the time of recovery from the accident of the crippled condition, and the time before the leg will be entirely well. It leads up to the testimony which goes to cover that particular element of damage.

The COURT.—The motion is denied. The jury will be specially instructed about that. Exception allowed.

Q. From an examination you have made of the plaintiff in this action would you say he is not at this time able to do manual labor?

A. In my opinion he is not.

Q. In your opinion how long, approximately, will it be before he can do the work of a laboring man, the ordinary common laborer. I am not asking you exactly.

A. I think from the condition of his leg that I would not expect him to do heavy manual labor for six months.

The COURT.—From this time? A. Yes." [179]

III.

The Court erred in denying defendant's motion for a nonsuit in favor of defendant and against plaintiff made at the close of plaintiff's testimony, such motion and the order of the Court denying same, as shown by the bill of exceptions, being as follows, to wit:

> "Mr. DONOHOE.—Comes now the above-named defendant and moves this Court for an order granting a nonsuit against the plaintiff and dismissing the case on the following grounds:
>
> 1. The complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant in this, that the plaintiff in his complaint has failed to plead facts sufficient, if true, to make Fred Frederickson a vice-principal of said defendant in his actions and conduct in relation to the

accident which caused the injury of which plaintiff complains.

2. That plaintiff has wholly failed by his evidence to prove that the said Fred Frederickson acted as vice-principal in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

3. That it is clearly shown by plaintiff's testimony that if said Fred Frederickson was guilty of any negligence, it was the negligence of a fellow-servant and not of a vice-principal.

4. That upon the evidence introduced by plaintiff, it clearly establishes the fact that plaintiff, by his conduct at and immediately before the time of the accident, assumed the risk which resulted in the accident which caused the injuries complained of.

5. That it is clearly established by the evidence of the plaintiff that the accident which caused the injury complained of was brought about through the sole negligence of plaintiff and, therefore, he is guilty of contributory negligence which bars his recovery against the defendant in this action.

The COURT.—Motion denied. Exception allowed."

IV.

The Court erred in denying defendant's motion for an instructed verdict in favor of defendant and against plaintiff made at the close of the entire case, such motion and the order of the Court denying the

same, as shown by the bill of exceptions, being as follows, to wit:

"Mr. DONOHOE.—We wish to make a motion and desire to argue that motion to some extent. [180]

The defendant now moves this Court to instruct the jury to find a verdict for the defendant and against the plaintiff on the following grounds:

1. The complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant in this, that plaintiff in his said complaint has failed to plead facts sufficient, if true, to make Fred Frederickson a vice-principal of the defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

2. The plaintiff has wholly failed to prove that said Fred Frederickson was a vice-principal of defendant or acted as vice-principal of defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

3. That it is clearly shown by the plaintiff's testimony that if said Fred Frederickson was guilty of any negligence it was the negligence of a fellow-servant and not that of the vice-principal of defendant.

4. The evidence introduced by plaintiff clearly establishes the fact that plaintiff, by his conduct at and immediately before the time

of the accident, assumed the risk which resulted in the accident which caused the injuries complained of.

5. That it is clearly established by the testimony of the plaintiff that the accident which caused the injuries complained of was brought about by the sole negligence of plaintiff and, therefore, he is guilty of contributory negligence which bars his right to recover in this action.

Motion for an instructed verdict was by the Court denied and defendant allowed an exception to the ruling."

V.

The Court erred in giving to the jury, over the exception of the defendant made in the presence of the jury and before they retired, the Court's instruction No. 5, which said instruction, together with defendant's exception thereto duly allowed by the Court as shown by the bill of exceptions, being as follows, to wit:

"Mr. DIMOND.—The defendant excepts to the second paragraph, not numbered, of the Court's instruction No. 5, reading as follows: [181]

'If the jury find from the evidence that Frederickson had no authority to direct the plaintiff as to the manner in which he performed his work, then he was not a vice-principal but he and the plaintiff were fellow-servants and plaintiff cannot recover even though you should find that his injury was due in whole or in part to some negligent action of Frederickson. His

right to recover in this action is dependent upon his showing by fair preponderance of the evidence that he was subject to Frederickson's orders, and that Frederickson was responsible for the way in which the wagon was loaded, including the quantity of the load.'

This exception is based on the defendant's theory of the case that Frederickson had no authority to act for the principal as to any nondelegable duties of the defendant and did not so act. And the evidence shows that any directions Frederickson may have given plaintiff were given as an operative concerning the details of the work.

Exception allowed."

VI.

The Court erred in giving to the jury, over the exception of the defendant made in the presence of the jury and before they retired, the Court's instruction No. 6, which said instruction, together with the defendant's exception thereto duly allowed by the Court as shown by the bill of exceptions, being as follows, to wit:

"Mr. DIMOND.—The defendant excepts to the Court's instruction No. 6 in its entirety as given by the Court on the ground, as stated in the exception to the former instruction, and that it assumes the defendant is bound by all orders of Frederickson where, as the defendant views the law, Frederickson in giving such orders was not performing any of the nondelegable duties of the defendant. That instruction reads as follows:

'You are instructed that it is not sufficient to entitle the plaintiff to recover in this case to show a negligent breach [182] of duty on the part of defendant corporation or its responsible agent, but it devolves upon the plaintiff to show further that such breach of duty was the proximate or immediate cause of his injury. If the plaintiff in any important degree or way contributed to the accident he was guilty of what is known in law as contributory negligence. In such case the law disregards the negligence of the defendant and makes the negligence of the plaintiff a bar to his recovery. You have already been instructed that a servant entering into employment assumes all the natural risks and hazards of the work. In this case if you find that the accident was due to any unusual conditions you are to determine from all the evidence in the case whether or not plaintiff was so bound by the orders given him by Frederickson, if orders were given him, that he could not without disobeying orders so shape his conduct as to avoid the unusual risk. If he could have so acted in the emergency by the exercise of reasonable prudence and foresight such as may be expected of an ordinary man in a like situation, and failed to do so, he was guilty of contributory negligence and is not entitled to recover.'

Exception allowed."

VII.

The Court erred in giving to the jury, over the

exception of the defendant made in the presence of the jury and before they retired, paragraph one (1) of the Court's instruction No. 7, which said instruction, together with the defendant's exception thereto duly allowed by the Court, as shown by the bill of exceptions, being as follows, to wit:

> "Mr. DIMOND.—The defendant excepts to the first paragraph, No. 1 of the Court's instructions No. 7;
>
> '1. That plaintiff is entitled to recover if he has proven by a fair preponderance of the evidence that his injury was the result of an unusual risk which he assumed under the direct orders of a vice-principal of the defendant corporation, and that he was guilty of no contributory negligence which aided materially in producing the accident, that is, under the circumstances he acted as might be expected of an ordinary prudent and careful man in his situation.'

upon the ground last-above stated, and that it assumes the plaintiff was bound to follow the orders of Frederickson and that his injury so resulting might be used as a basis of plaintiff's negligence against the defendant. Exception allowed." [183]

VIII.

The Court erred in giving to the jury, over the exception of the defendant made in the presence of the jury and before they retired, paragraph two b (2b) of the Court's instruction No. 7, which said instruction, together with the defendant's excep-

tion thereto duly allowed by the Court, as shown by the bill of exceptions, being as follows, to wit:

"The defendant also excepts to the Court's instructions subparagraph 2 (b) of the Court's instruction No. 7, reading as follows:

> 'That plaintiff is not entitled to recover if you find * * * (b) If he was injured through the act of a fellow-servant, that is the act of an employee who had no controlling authority over him in the circumstances.'

Exception allowed."

IX.

The Court erred in giving to the jury, over the exception of the defendant made in the presence of the jury and before they retired, the Court's instruction No. 8, which said instruction, together with the defendant's exception thereto duly allowed by the Court, as shown by the bill of exceptions, being as follows, to wit:

"Mr. DIMOND.—Defendant further excepts to the Court's instruction No. 8 in its entirety upon the ground that there is no substantial basis for it in the evidence, the instruction reading as follows:

> 'If you find that plaintiff is entitled to recover you will include in the amount of his recovery whatever reasonable sums he has paid for medical and hospital treatment; second, such sum as will compensate him for his loss of time from work; third, such sum as the jury may find he is entitled to receive for the mental and physical pain and suffering he has undergone as the result of his said in-

jury. This latter sum is difficult of exact computation since pain and suffering can not be [184] measured in money. The amount allowed is left to the sound discretion of the jury. The total amount must not exceed the amount asked in plaintiff's complaint, to wit, $6358.'

Exception allowed."

X.

The Court erred in refusing to give defendant's requested instruction No. 2, which said instruction, together with the defendant's exception to the Court's refusal to give the same made in the presence of the jury and before the jury retired, as shown by the bill of exceptions, is as follows, to wit:

"Mr. DIMOND.—The defendant further excepts to the Court's refusal to give its requested instruction No. 2, reading as follows:

'You are instructed that the plaintiff's own testimony shows that he remained on the wagon to which he has testified at the time when the wagon was being loaded by the defendant's employee, Fred Frederickson, and when he had ample opportunity to remove himself to a place of safety. By so doing the plaintiff knowing, as he had pleaded, the condition of the streets of the town of Cordova, and particularly the condition of the streets in said town, assumed all of the risks incident to his remaining on said wagon and attempting

to drive with it down said B Street, and the defendant is not liable for the injuries plaintiff thus suffered.'

Exception allowed."

XI.

The Court erred in refusing to give defendant's requested instruction No. 4, which said instruction, together with the defendant's exception to the Court's refusal to give the same made in the presence of the jury and before the jury retired, as shown by the bill of exceptions, is as follows, to wit:

"Mr. DIMOND.—The defendant excepts to the refusal of the Court to give its requested instruction No. 4, reading as follows, to wit:

'I instruct you that a servant assumes the ordinary risks of his employment and is bound to exercise his own skill and diligence to protect himself, and unless you find from the evidence that the plaintiff exercised due skill and diligence to protect himself in choosing the route down B Avenue over the snow and ice in preference to the route of B Avenue to Second Street then you must find for the defendant.'

Exception allowed." [185]

XII.

The Court erred in denying defendant's motion for a new trial, to which order and ruling of the Court the defendant then and there duly excepted and the exception was allowed.

XIII.

The Court erred in entering judgment in favor of the plaintiff and against the defendant.

WHEREFORE, defendant, The Blum-O'Neill Company, prays that the said judgment of the district court of the Territory of Alaska, third division, may be reversed, set aside and held for naught.

DONOHOE & DIMOND,
Attorneys for Defendant, and Plaintiff in Error, The Blum-O'Neill Company.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1923. W. N. Cuddy Clerk. By S. N. Scott, Deputy. [186]

In the District Court for the Territory of Alaska, Third Division.

No. C–246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM–O'NEILL COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

On this 18th day of August, 1923, came the above-named defendant and plaintiff in error herein by its attorneys and filed and presented to the Court its petition praying for the allowance of a writ of

error, and the assignments of error intended to be urged by it; praying also that a transcript of the record, testimony, proceedings and papers upon which the order and judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that such other and further proceedings may be had as may be proper in the premises.

NOW, THEREFORE, in consideration of the premises, and the Court being fully advised, it is

ORDERED that the aforesaid writ of error be, and the same hereby is, allowed upon the said defendant giving a bond according to law in the sum of Three Thousand Dollars ($3,000.00), which shall operate as a supersedeas. It is further

ORDERED that a transcript of the record, testimony, papers, files and proceedings, and the plaintiff's original exhibits admitted in evidence at the trial of said cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Done by the Court at Valdez, Alaska, August 18, 1923.

E. E. RITCHIE,
District Judge.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy.

Entered Court Journal No. 13, page No. 908. [187]

In the District Court for the Territory of Alaska, Third Division.

No. C–246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM–O'NEILL COMPANY, a Corporation,

Defendant.

Supersedeas and Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, The Blum-O'Neill Company, a corporation, organized and existing under the laws of the Territory of Alaska, and having its usual and principal place of business at Cordova, in said Territory, as principal, and National Surety Company, a corporation, organized under the laws of the State of New York, and authorized to do business as a surety in the Territory of Alaska, as surety, are held and firmly bound unto F. J. Sullivan, plaintiff above-named, in the sum of Three Thousand Dollars ($3,000.00) to be paid to the said F. J. Sullivan, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 15th day of August, 1923.

WHEREAS, the above-named defendant, The Blum-O'Neill Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered against it in the above-entitled action by the District Court for the territory of Alaska, Third Division, which judgment was so rendered and entered by said Court on the 21st day of June, 1923, for the sum of Two Thousand Two Hundred Fifty ($2,250.00) and costs; and for the return of certain property. [188]

NOW, THEREFORE, the condition of the above obligation is such that if the above-named The Blum-O'Neill Company, a corporation, shall prosecute said writ to effect, and shall answer all costs and damages, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the principals named herein have hereunto set their hands, and the surety named herein has hereunto set its hand and affixed its corporate seal, this 15th day of August, A. D. 1923.

THE BLUM-O'NEILL COMPANY.
Per M. BLUM, President,
Principal.

NATIONAL SURETY COMPANY.
[Seal] By GEO. J. LOVE,
Its Agent and Attorney in Fact,
Surety.

Attest: J. L. REED,
Attorney in Fact for National Surety Company.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy. [189]

United States of America,
Territory of Alaska,—ss

George J. Love, being first duly sworn, upon his oath says: I am the duly appointed and authorized agent of the National Surety Company, a corporation, the surety named in and which caused to be executed the foregoing supersedeas and cost bond on writ of error. That in conjunction with J. L. Reed, of Valdez, Alaska, I executed said undertaking for and on behalf of said corporation, under due and full authority so to do.

That said corporation is a corporation organized and existing under the laws of the State of New York, and is duly qualified, authorized and empowered to do and transact business as a surety in the Territory of Alaska, and to execute and become surety upon the foregoing undertaking; and, to the best of my knowledge and belief, it has fully complied with the provisions of Chapter 52 of the Session Laws of Alaska of the year 1915, approved April 29, 1915, and entitled:

> "An act relative to bail, recognizance, stipulations, bonds and undertakings, and to allow certain corporations to become surety thereof, and for other purposes,"

and that said corporation has fully complied with all other laws of the United States and of the Territory of Alaska.

GEO. J. LOVE.

Subscribed and sworn to before me this 15th day of August, 1923.

[Notarial Seal] ANTHONY J. DIMOND,
Notary Public for Alaska.

My commission expires Feb. 14, 1925.

Receipt of copy of foregoing bond acknowledged July ——, 1923.

FRANK H. FOSTER,
One of Attorneys for Plaintiff. [190]

The above and foregoing bond approved this 18th day of August, 1923, and ordered filed, and that the same operate as a supersedeas.

E. E. RITCHIE,
District Judge. [191]

In the District Court for the Territory of Alaska, Third Division.

No. C–246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM–O'NEILL COMPANY, a Corporation,

Defendant.

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.
The President of the United States, to the Honorable E. E. RITCHIE, Judge of the District Court for the Territory of Alaska, Third Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before you, or some of you, between F. J. Sullivan, plaintiff, and The Blum-O'Neill Company, a corporation, defendant, manifest error hath happened to the great damage of said defendant, The Blum-O'Neill Company, as is stated in its petition herein. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said circuit, within thirty days from the date of this writ, in the said Circuit [192] Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that

error, what of right and according to the laws and customs of the United States and the Territory of Alaska should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 18th day of August, A. D. 1923, and in the one hundred and forty-eighth year of the Independence of the United States of America.

Allowed by:

E. E. RITCHIE,

Judge of the District Court for the Territory of Alaska, Third Division.

[Seal] Attest: W. N. CUDDY,

Clerk of the District Court for the Territory of Alaska, Third Division.

Due service of the within writ of error by receipt of a copy thereof is hereby acknowledged this 18th day of August, 1923.

FRANK H. FOSTER and
L. V. RAY,

Attorneys for Plaintiff and Defendant in Error.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy.

Entered Court Journal No. 13, page No. 909. [193]

In the District Court of the Territory of Alaska, Third Division.

No. C–246.

F. J. SULLIVAN,

Plaintiff,

vs

THE BLUM–O'NEILL COMPANY, a Corporation,

Defendant.

Citation on Writ of Error.

The United States of America to F. J. Sullivan:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within 30 days from the date of this writing, pursuant to a writ of error in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein The Blum-O'Neill Company, a corporation, is plaintiff in error and F. J. Sullivan is defendant in error, and show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 18th day of August, in the year of our Lord one thousand nine hundred

and twenty-three, and of the Independence of the United States the one hundred and forty-eighth.

E. E. RITCHIE,
District Judge, Territory of Alaska, Third Division.

Service above citation by receipt of a certified copy thereof admitted at Cordova, Alaska, this 18th day of August, 1923.

FRANK H. FOSTER,
One of Attorneys for Defendant in Error.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy.

Entered Court Journal No. 13, page No. 909. [194]

In the District Court for the Territory of Alaska, Third Division.

No. C–246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM–O'NEILL COMPANY, a Corporation,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-named Court:

You will please make, certify and transmit forthwith to the United States Circuit Court of Appeals

for the Ninth Circuit, at San Francisco, California, a true copy of the record, opinion or opinions of the Court, bill of exceptions, assignment of errors, and all proceedings in the above-entitled cause, under your hand and the seal of said District Court, as a return to the writ of error heretofore sued out of said Circuit Court of Appeals to review the judgment rendered in said cause by said District Court on June 21, 1923, the same to include the following files, records and proceedings in said cause, to wit:

1. Bill of exceptions as allowed and settled by said District Court and containing:

a. Plaintiff's complaint.
b. Defendant's second amended answer.
c. Minute order of February 21, 1923, permitting second amended answer to be filed.
d. Plaintiff's reply.
e. Transcript of testimony and of the proceedings had upon the trial of said action.
f. Plaintiff's Exhibits "A" and "B" (Originals).
g. Defendant's Exhibit No. 1.
h. Verdict. [195]
i. Motion for new trial.
j. Minute order denying motion for new trial.
k. Opinion of Court on motion for new trial.
l. Judgment.
m. Order amending *nunc pro tunc* of as February 21, 1923, the minute order of the Court of that date permitting defendant to file second amended answer, and providing that plaintiff's reply theretofore filed should

stand as reply to such second amended answer.

n. Order granting defendant sixty days from date of judgment to prepare, settle and file bill of exceptions, on writ of error, and fixing supersedeas and cost bond at $3,000.

o. Order settling and certifying bill of exceptions.

2. Petition for writ of error.
3. Assignment of errors.
4. Order allowing writ of error.
5. Writ of error (Original).
6. Supersedeas and cost bond on writ of error.
7. Citation on writ of error (Original).
8. This praecipe.

DONOHOE & DIMOND,
Attorneys for Defendant and Plaintiff in Error.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1923. W. N. Cuddy, Clerk. By ————, Deputy. [196]

In the District Court for the Territory of Alaska, Third Division.

No. C–246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM–O'NEILL COMPANY, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, W. N. Cuddy, Clerk of the District Court, Territory of Alaska, Third Division, DO HEREBY CERTIFY that the above and foregoing and hereto annexed 196 pages, numbered from 1 to 196, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office, including Plaintiff's Original Exhibits "A" and "B"; that this transcript is made in accordance with the praecipe filed in my office on the 18th day of August, A. D. 1923.

I FURTHER CERTIFY that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to $32.65 has been paid to me by Anthony J. Dimond, Esq., one of the attorneys for the defendant and appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 22d day of August, A. D. 1923.

[Seal] W. N. CUDDY,
Clerk.

[Endorsed]: No. 4095. United States Circuit Court of Appeals for the Ninth Circuit. The Blum-O'Neill Company, a Corporation, Plaintiff in Error, vs. F. J. Sullivan, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed September 7, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.